SUPREME COURT

No. 14-1095

Title:	Michael Musacchio, Petitioner v. United States
Docketed:	March 11, 2015
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(13-11294)
Decision Date:	November 10, 2014
Rehearing Denied:	December 9, 2014

Questions Presented

—Date—	——Proceedings and Orders——————————
Mar 9 2015	Petition for a writ of certiorari filed. (Response due April 10, 2015)
Apr 2 2015	Order extending time to file response to petition to and including May 11, 2015.
Apr 30 2015	Order further extending time to file response to petition to and including May 26, 2015.
May 22 2015	Brief of respondent United States in opposition filed.
Jun 2 2015	DISTRIBUTED for Conference of June 18, 2015.
Jun 2 2015	Reply of petitioner Michael Musacchio filed. (Distributed)
Jun 22 2015	DISTRIBUTED for Conference of June 25, 2015.
Jun 29 2015	Petition GRANTED.
Jul 7 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 28, 2015.
Jul 7 2015	The time to file respondent's brief on the merits is extended to and including October 13, 2015.
Aug 28 2015	Joint appendix filed. (Statement of costs filed)
Aug 28 2015	Brief of petitioner Michael Musacchio filed.
Oct 9 2015	SET FOR ARGUMENT on Monday, November 30, 2015
Oct 13 2015	Brief of respondent United States filed.
Oct 19 2015	Record requested from U.S.C.A. 5th Circuit.
Oct 27 2015	CIRCULATED
Nov 12 2015	Reply of petitioner Michael Musacchio filed. (Distributed)
Nov 30 2015	Argued. For petitioner: Erik S. Jaffe, Washington, D. C. For respondent: Roman Martinez, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jan 25 2016	Adjudged to be AFFIRMED. Thomas, J., delivered the opinion for a unanimous Court.
Feb 26 2016	Judgment Issued

Supreme Court, U.S.
FILED
MAR 9 - 2015
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14-1095

No. _____

In The
Supreme Court of the United States

MICHAEL MUSACCHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment?

2. Whether a statute-of-limitations defense not raised at or before trial is reviewable on appeal?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Michael Musacchio was the defendant in the district court and the appellant in the Fifth Circuit.

Roy Brown and Michael Kelly were co-defendants in the district court under the original indictment. They pled guilty prior to trial and were not parties to the appeal in the Fifth Circuit.

Respondent the United States of America prosecuted the case in the district court and was the appellee in the Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The judgment of conviction and sentence of the District Court for the Northern District of Texas is attached at Appendix B1-B12. The transcript of the court's oral denial of a motion for a new trial is attached at Appendix D1-D2.

The opinion of the Fifth Circuit affirming the district court's judgment is unpublished but available at 590 Fed. Appx. 359, 2014 U.S. App. LEXIS 21358, and is attached at Appendix A1-A16.

JURISDICTION

The Fifth Circuit issued its opinion on November 10, 2014. The Fifth Circuit denied rehearing and rehearing *en banc* on December 9, 2014. App. C1-C2. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 3231.

STATUTES INVOLVED

18 U.S.C. § 1030, entitled "Fraud and Related Activity in connection with computers," provides, in relevant part:

> (a) Whoever— * * *
>
> (2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains— * * *
>
> (C) information from any protected computer; * * *

> shall be punished as provided in subsection (c) of this section.

18 U.S.C. § 371, the general conspiracy statute, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 3282(a), the general limitations statute, provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

1. This case presents two recurring questions of criminal procedure that can significantly affect the outcome of prosecutions and that have divided the courts of appeals.

The first asks what the government must prove when the jury instructions, to which it did not object, erroneously include additional or more stringent elements for a crime than does the statute and the indictment. Two circuits apply the law-of-the-case doc-

trine to hold the government to the heightened elements of the instructions when later testing the sufficiency of the evidence. Two other circuits, including the Fifth Circuit below, have created an exception to the law-of-the-case doctrine and test the evidence only against the statute and the indictment.

The second question asks whether a statute of limitations defense not raised at or before trial may be reviewed on appeal. Three circuits hold that the defense may be reviewed for plain error or otherwise. Seven circuits, including the Fifth Circuit below, hold that the defense is waived and unreviewable.

Both of these issues are squarely presented by the judgment below and this case is a clean and straightforward vehicle for resolving the splits.

2. The procedural questions presented by this case arise in the context of a prosecution for making unauthorized access to a protected computer. Such alleged access occurred in the course of business competition between two transportation brokerage companies.

Prior to 2004, Petitioner Musacchio was the president of Exel Transportation Services ("ETS"), a transportation brokerage company that arranges freight shipments for business clients. App. A1. Musacchio resigned from ETS in 2004 and in 2005 (after expiration of his non-compete agreement) founded a competing company. Two ETS employees – original co-defendants Roy Brown and Michael Kelly – later joined Petitioner at his new company. Several independent sales agents and other employees also eventually followed Petitioner from ETS to his new company.

As the two companies competed for sales agents, Petitioner's former company, ETS, became suspicious that Petitioner and his new company seemed to possess certain information regarding ETS. ETS eventually concluded that Petitioner and others must have obtained that information from ETS's computer servers.

3. In 2010, the United States indicted Petitioner, Brown, and Keily for accessing and conspiring to access the protected computers of their former employer, ETS, in violation of 18 U.S.C. § 1030(a)(2)(C). The statute provides criminal penalties for anyone who "intentionally accesses a computer without authorization *or* exceeds authorized access, and thereby obtains— * * * information from any protected computer" (emphasis added). What is most relevant for present purposes is that the statute provides for two discrete means of committing the crime: either (1) accessing a computer "without authorization" or (2) "exceed[ing] authorized access" to a computer.

Initially the government indicted the three defendants for conspiring to engage in and engaging in *both* types of computer access. After defendants Brown and Kelly pled guilty, however, the government filed superseding indictments in 2012 and 2013, altering the charges against Petitioner by changing certain of the dates and events alleged in Count 2, limiting the charges to conspiring to access and accessing "without authorization," and dropping the charges of "exceed[ing] authorized access." App. A2-A3. The superseding indictments were filed more than five years after the underlying events. The final charges against Petitioner consisted of one count

of conspiracy to make unauthorized access (Count 1) and two substantive counts of making unauthorized access (Counts 2 and 3).

4. At trial the government sought to demonstrate that Petitioner and alleged co-conspirator Roy Brown had accessed ETS's computer servers without authorization by signing in with old administrative access codes. The government also sought to show that Petitioner's unindicted former assistant had given him internal company e-mails to which she had authorized access. App. A3.

5. At the close of the trial, the district court instructed the jury regarding the conspiracy count that:

> Title 18 U.S.C. § 1030(a)(2)(C) makes it a crime for a person to intentionally access a protected computer *without authorization* **and** *exceed authorized access*, and thereby obtain information * * *
>
> For you to find the defendant guilty of this crime, you must be convinced that the government has proved * * *
>
> First: That the defendant and at least one other person made an agreement to commit the crime of unauthorized access to a protected computer in violation of 18 U.S.C. § 1030(a)(2)(C) *as defined above*.

Jury Instructions and Verdict Form (emphasis added) [Dkt. 166]; App. A3.

Having defined the two alternative methods for committing the underlying crime in the conjunctive, this instruction made *both* unauthorized access and

exceeding authorized access required elements of the crime and hence the conspiracy to commit that crime.

6. The government did not object to this definition and, in fact, argued in its closing that Petitioner had also "exceeded" authorized access—a crime for which he was not indicted. *See* Brief of Appellant at 11 & n. 48, 14 (May 1, 2014).

7. On March 1, 2013, the jury returned a general verdict of guilty on all counts. [Dkt. 166]

8. Following the verdict, Petitioner moved for a new trial or an acquittal, arguing, *inter alia*, that due to the jury charge the government was required to prove an agreement to engage in *both* unauthorized access and exceeding authorized access and that there was insufficient evidence to establish the latter. Motion for a New Trial, Mar. 15, 2013 [Dkt. 170]; Supplemental Motion for Judgment of Acquittal, Aug. 29, 2013 [Dkt. 199]; Second Supplement to Motion for Acquittal, Nov. 19, 2013 [Dkt. 221].

9. The district court orally rejected the motion for a new trial, App. D2, made no express ruling on the supplemental motion for acquittal, and, on November 19, 2013, entered judgment against Petitioner sentencing him to sixty months imprisonment on Counts 1 and 2 concurrently, and three consecutive months on Count 3. App. B1-B3.

10. Petitioner timely appealed to the Fifth Circuit, arguing, *inter alia*, that the conjunctive jury instruction for Count 1 was the law of the case and binding on the government, and that there was insufficient

evidence as a matter of law to establish the "exceeds authorized access" element of the crime. App. A5.[1]

Petitioner also argued that because Count 2 of the superseding indictment significantly altered the charges and allegations against him, it did not relate back to the original indictment against the three alleged conspirators, was filed more than five years after the alleged criminal acts, and hence prosecution was barred by the statute of limitations. App. A8-A9; Brief of Appellant at 48-50.

11. On November 10, 2014, the Fifth Circuit affirmed Petitioner's conviction and sentence. App. A1.

Regarding the law-of-the-case/sufficiency-of-the-evidence challenge to Count 1, the court of appeals reviewed the issue *de novo*. It acknowledged that the district court "incorrectly instructed the jury that it had to find that Musacchio had agreed to make unauthorized access *and* exceed authorized access" and that neither party objected to the instruction. App. A5 (emphasis in original). And while the court recognized the general rule that " '[a]n instruction that increases the government's burden and to which the government does not object becomes the law of the case, [citation omitted]' " it held that the "rule does not apply where (1) 'the jury instruction * * * is pa-

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[1] The sufficiency of the evidence for the "exceeds authorized access" element turns primarily on whether that term encompasses fully authorized *access* to computer information followed by misuse of that information, or whether it is limited to accessing information to which the otherwise-authorized user had no authority to access at all. There is a circuit split on that question and the evidence in this case would not satisfy the narrower construction of the statute. *See infra* at 8-9, 20-21 n. 5.

tently erroneous and (2) the issue is not misstated in the indictment,'" quoting *United States v. Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), *cert. denied*, 546 U.S. 1115 (2006). App. A5-A6. Finding that the jury instruction was obviously in error, and that the indictment correctly charged only a conspiracy to make "unauthorized" access to a protected computer, the court held that the *Guevara* exception to the law-of-the-case doctrine applied. App. A6-A7. The court then found that the evidence was sufficient to establish an agreement to make unauthorized access. The majority opinion did not reach whether the evidence also was sufficient to demonstrate an agreement to exceed authorized access, and did not address a heavily briefed circuit split bearing upon that latter issue. *See infra* at 8-9, 20-21 n. 5.

Regarding Musacchio's statute of limitations defense that Count 2 of the superseding indictment altered the indictment and came more than five years after the alleged events, the court held that because it was not raised in the district court it was waived. App. A8 (citing *United States v. Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (per curiam), *cert. denied*, 503 U.S. 908 (1992)). The court noted that Fifth Circuit precedent has applied the waiver rule "in precisely the situation here—where the issue can be resolved on the face of the indictment." App. A9 (citation omitted).

Judge Haynes concurred in the judgment, but declined to join the court's reasoning as to the law-of-the-case exception. She instead would have concluded that there was sufficient evidence for "both prongs ('exceeds authorized use' and 'unauthorized access')

and, therefore would not reach the issue." App. A16. In order to reach that conclusion, she relied upon *United States v. John*, 597 F.3d 263, 270-73 (5th Cir. 2010), which rejected an argument that "the statute does not prohibit unlawful *use* of material that [defendant] was authorized to access through authorized use of a computer," but rather "only prohibits using authorized access to obtain information that [defendant] is not entitled to obtain." *Id.* at 271. The Fifth Circuit in *John* candidly recognized that the panel's broader view of what constituted exceeding authorized access, while consistent with the First Circuit's approach, was in conflict with the Ninth Circuit's *en banc* interpretation of that language. *Id.* at 272-73.

12. On December 9, 2014, the Fifth Circuit denied Petitioner's petition for rehearing *en banc*. App. C1-C2.

13. Petitioner began serving his sentence on February 11, 2015.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari because the decision below erroneously resolves a recurring and important issue regarding the applicability of the law-of-the-case doctrine and conflicts with decisions of the Eighth and Tenth Circuits. The decision below also continues a broad split over whether a statute-of-limitations defense not raised at or before trial is waived and hence unreviewable on appeal, as seven circuits have held, or may be raised under a plain error standard or otherwise, as three circuits have held. Both issues arise regularly and lead to different outcomes for similarly situated de-

fendants based only on the circuit in which the prosecution was brought.

I. The Circuits Are Split Regarding the Scope of the Law-of-the-Case Doctrine as Applied to Extra-Statutory Elements Included in Jury Instructions.

In refusing to apply the law-of-the-case doctrine to match the prosecution's burden of proof to the conjunctive jury instruction to which the government did not object, the Fifth Circuit continued its participation in an established circuit split. The court of appeals recognized that "[i]n general, '[a]n instruction that increases the government's burden and to which the government does not object becomes the law of the case,' *United States v. Jokel*, 969 F.2d 132, 136 (5th Cir. 1992)," but held that the general "rule does not apply where (1) 'the jury instruction * * * is patently erroneous and (2) the issue is not misstated in the indictment,'" quoting *Guevara*, 408 F.3d at 258. App. A5-A6. The court concluded that the "*Guevara* exception applies here." App. A6.

In *Guevara*, the Fifth Circuit reviewed the sufficiency of the evidence for a conviction where the jury instruction required the government to show defendant's actions would have "substantially affected" interstate commerce. The statute and the indictment, however, only required that the actions would have "affected" interstate commerce, without requiring the effect to be substantial. 408 F.3d at 258. The Fifth Circuit held the government only to the lower statutory standard rather than the more stringent jury-instruction standard. *Id.* The court adopted a broad

exception to the general law-of-the-case doctrine, under which an erroneous jury instruction increasing the government's burden "may not become law of the case if both (1) it is patently erroneous and (2) the issue is not misstated in the indictment." *Id.*

Guevara took this rule from the analytically identical First Circuit case of *United States v. Zanghi*, 189 F.3d 71, 79-80 (1st Cir. 1999), *cert. denied*, 528 U.S. 1097 (2000). In *Zanghi*, the First Circuit recognized the general rule that a jury instruction raising the government's burden of proof, without objection, beyond that required by statute becomes law of the case when later evaluating the sufficiency of the evidence. But it adopted an exception to that rule in a case involving a heightened scienter requirement because the more stringent jury instruction was "patently incorrect" and the indictment had stated the correct standard. *Id.*

The rule in the Fifth and First Circuits, however, conflicts with the rule in the Eight and Tenth Circuits, which apply the law-of-the-case doctrine in the same circumstances to hold the government to any heightened burden imposed by jury instructions to which it did not object. Those circuits apply the doctrine regardless whether the indictment correctly charges fewer or less onerous elements, and regardless whether the jury instruction setting a higher burden was patently erroneous.

For example, in *United States v. Staples*, the Eighth Circuit held that an erroneous jury instruction stating alternative elements in the conjunctive rather than the disjunctive became law of the case. 435 F.3d 860, 866-67 (8th Cir.) (in prosecution for

bank fraud, "instruction advised the jury that it must find that the defendant's scheme was designed to obtain monies that were owned by *and* under the custody of the financial institution, rather than monies that were owned by *or* under the institution's custody") (emphasis in original), *cert. denied*, 549 U.S. 862 (2006). The error in the jury instruction—substituting "and" for "or"—was precisely as clear as in this case and the indictment made no such error. Indeed, from a structural perspective *Staples* and the current case are identical in that the jury was instructed in the conjunctive on two discreet and separate means of committing a crime. Applying the law-of-the-case doctrine, the court treated the two separate means as *both* being required elements of the government's burden of proof. Because there was insufficient evidence as to one of the means, the court reversed the conviction even though the evidence would have been sufficient to convict on the second means if a proper, disjunctive or single-means instruction had been given. *Id.*

Other Eighth Circuit cases similarly apply the law-of-the-case doctrine to indistinguishable circumstances. *See United States v. Torres-Villalobos*, 487 F.3d 607, 611 n. 1 (8th Cir. 2007) ("final jury instructions imposed a requirement that the government prove *both* that Torres-Villalobos entered *and* was found in the United States. * * * This heightened requirement thus became the law of the case") (emphasis in original) (citing *Staples*); *United States v. Ausler*, 395 F.3d 918, 920 (8th Cir.) (holding that an erroneous and more stringent jury instruction given without government objection became the law of the case for the

purpose of reviewing defendant's sufficiency challenge), *cert. denied*, 546 U.S. 861 (2005).

One Eighth Circuit panel, however, has mistakenly suggested that the circuit does not follow the law-of-the-case doctrine at all where the jury instructions increase the government's burden of proof. *United States v. Inman*, 558 F.3d 742, 748 (8th Cir.), *cert. denied*, 558 U.S. 916 (2009). The *Inman* panel unfortunately misread earlier precedent on a different issue – whether the law-of-the-case doctrine could *excuse* a *plaintiff* from having to prove all statutory elements required to impose liability where defendant failed to object to the omission of an element. *Id.* (discussing *Coca Cola Bottling Co. of Black Hills v. Hubbard*, 203 F.2d 859 (8th Cir. 1953)).

Hubbard was a civil case holding that a *defendant* held liable under a statute is not bound by law of the case when raising a sufficiency of the evidence challenge involving an unproven statutory element for liability, regardless whether he failed to object to a jury instruction neglecting such element. 203 F.2d at 861-62. *Inman* noted that *Hubbard* disapproved of a criminal case stating that a criminal defendant was bound, for sufficiency of the evidence purposes, by jury instructions to which he did not object that failed to included a required statutory element. 558 F.3d at 748 (noting *Hubbard*'s disapproval of *Pevely Dairy Co. v. United States*, 178 F.2d 363, 367 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950)). But cases finding that civil or criminal *defendants* cannot be subject to liability or punishment based on *less* proof than is required by statute involve a very different question than whether a non-objecting plaintiff or

prosecutor can bind themselves to having to prove *more* than the statutory minimum, as *Staples* and similar cases have held. There thus was never any conflict between *Hubbard* and subsequent cases such as *Staples* and *Ausler*, which held only that the law-of-the-case doctrine could *increase* the government's burden, not that it could excuse a statutory element of a crime.[2]

A subsequent Eighth Circuit case applying *Inman* illustrates the contradictory aspects of the opinion and effectively limits its reach. In *United States v. Johnson*, 652 F.3d 918, 922 (8th Cir. 2011), the court held that the first step of the *Inman* analysis was to apply the law of the case and see whether the evidence was sufficient for a rational jury to find each element of the offense " 'as charged in the jury instructions' " to which the government made no objection. (Quoting *Inman*); *see also id.* n. 2 (citing *Ausler* and *United States v. Williams*, 376 F.3d 1048, 1051

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[2] *Inman* is problematic for the further reason that it completely contradicts itself and *Hubbard* in its very next paragraph when it says that because a criminal defendant may not challenge a jury instruction to which it did not object, a sufficiency-of-the-evidence challenge can be measured against the (incomplete) jury instructions alone, and "there is no need to conduct a separate analysis of whether the evidence was sufficient to establish statutory elements on which the appellant did not seek an instruction." 558 F.3d at 748. That is precisely the opposite of what *Hubbard* held, and the exact same as what the disapproved *Pevely* held. More strange still, *Inman* cites *Ausler* with approval in the midst of this paragraph. *Ausler*, of course, applies the precise same law-of-the-case rule as *Staples*. *Supra* at 12.

(10th Cir. 2004), for the proposition that law of the case binds the government to more stringent jury instructions to which it did not object). If the evidence is insufficient to establish the elements set forth in the jury instructions, *Johnson* reads *Inman* to provide the government a limited way out of its bind, allowing a conviction to be affirmed under a "rigorous standard of review" if the court can conclude that " 'the evidence is so overwhelming or incontrovertible that there is no reasonable doubt that any rational jury would have found that the government proved the statutory element.' " *Johnson*, 652 F.3d at 922-23 (quoting *Inman*). *Johnson* held that the government had failed this rigorous standard of review and expressly rejected "the relatively government-friendly standard applied in" *Guevara* and *Zanghi*. *Id.*[3]

Regardless whether *Inman*'s flawed and contradictory reasoning render it a complete aberration or it survives as a limited alternative path for the government as in *Johnson*, all potential versions of Eighth Circuit law reject the standard in the First and Fifth Circuits, apply the law-of-the-case doctrine

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[3] Another Eighth Circuit case has recognized the potential confusion created by *Inman* but found it unnecessary to resolve it. *United States v. Littlewind*, 595 F.3d 876, 884 n. 2 (8th Cir. 2010) (observing that *Inman* viewed prior law-of-the-case precedent as *dicta*, but noting that the "issue of whether the intent element became the law of the case is not squarely presented by the parties, and we refuse to address the issue in this novel context"). And yet another post-*Inman* case simply cited *Staples* but found the evidence satisfied the jury instructions. *United States v. Bell*, 761 F.3d 900, 908-09 (8th Cir.), *cert. denied*, -- U.S. --, 135 S. Ct. 503 (2014) (noting defendant's reliance on *Staples* for law-of-the-case doctrine but finding that government satisfied elements set forth in jury instructions).

either as an initial step or as the complete measure of the government's burden, and hence the split raised in this case remains, though now potentially with three, rather than two, alternative approaches.

The other circuit fully participating in the split is the Tenth Circuit, which squarely applies the law-of-the-case doctrine in circumstances such as in this case. *See United States v. Romero*, 136 F.3d 1268, 1272-73 (10th Cir. 1998) (where jury instructions erroneously placed the burden on the government to prove the non-Indian status of the victims in an assault case occurring on an Indian reservation, court reversed conviction based on government's failure to introduce evidence regarding that added element). The *Romero* court acknowledged the government's position that "the non-Indian status of the victim in § 1152 cases is an exception to the statute which must be raised and established by the defendant, but nonetheless held that '[b]ecause the unopposed jury instructions making the non-Indian status of the victims an element of the Government's case formed the law of this case," it would reverse the conviction for insufficient evidence. *See also Williams*, 376 F.3d at 1051 (10th Cir) (recognizing that "the government [has] the burden of proving each element of a crime as set out in a jury instruction to which it failed to object, even if the unchallenged jury instruction goes beyond the criminal statute's requirements," though finding that the government did object to the instruction).[4]

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[4] The First Circuit sought to distinguish *Romero* as involving a jury instruction that "may have been legally correct," and hence would not have triggered the exception for patently erro-

The Eleventh Circuit has brushed up against the split, but chose to distinguish *Guevara* rather than reject it outright. *See United States v. Raphael*, 487 Fed. Appx. 490, 506 n. 9 (11th Cir. 2012) (unpub.) (applying law of the case where additional element of crime was added to jury charge and distinguishing Fifth Circuit *Guevara* exception because government stipulated to the erroneous element at pretrial conference and hence "we cannot say that the District Court erred in its jury instructions when it" included that additional element), *cert. denied sub nom. Baptiste v. United States*, -- U.S. --, 133 S. Ct. 1293 (2013). That the government agreed to an erroneous instruction in *Raphael*, however, hardly makes it less erroneous, and hence it is unlikely that the First and Fifth Circuits would find that distinction relevant to whether the instruction was "patently erroneous." In any event, whether literally part of the "split" or not, *Raphael* further illustrates that the issue arises regu-

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neous instructions. *Zanghi*, 189 F.3d at 80 n. 10. But that attempted distinction ignores what the Tenth Circuit actually held. After noting that the district court "determined that notwithstanding the instruction, the non-Indian status was a matter of defense to be proved by the defendant," *i.e.*, that its own instruction was erroneous, the court of appeals noted that the issue of who should have had the burden of proof, while interesting, was irrelevant. "[T]his circuit's law of the case doctrine now prevents us from reaching these intriguing questions. Instead, we are compelled to find that Romero's conviction must be overturned because of the Government's failure to prove an element of the crime as charged to the jury." *Romero*, 136 F.3d at 1271. Such a holding preventing the Tenth Circuit from even addressing whether the instruction was erroneous (patently or otherwise) is unavoidably in conflict with the First and Fifth Circuit exception for patently erroneous jury instructions.

larly and is being resolved in conflicting manners on indistinguishable fact patterns.

Other federal and state courts also have applied the law-of-the-case doctrine in comparable circumstances. *See, e.g., United States v. Winckelmann*, 2010 CCA LEXIS 390 (U.S. Army Ct. Crim. App. Nov. 30, 2010) (unpub.), at *15-*16 (military judge's instruction "went beyond what has been required by the majority of circuits," government did not object, and hence more stringent instruction "constitutes the law of the case and binds the parties"), *rev'd on other grounds*, 70 M.J. 403, 407 n. 7 (CAAF 2011) (noting error in instruction but finding it irrelevant to issue on further appeal); *Winckelmann*, 2010 CCA LEXIS 390 at *75-76 (Ham, J., concurring in part and dissenting in part and in the result) (agreeing with plurality that law of the case applies regardless of error in definition of element, citing *Staples* and *Romero*); *Brewster v. McNeil*, 720 F. Supp.2d 1369, 1374-75 (S.D. Fla. 2009) (holding, in a 28 U.S.C. § 2254 habeas proceeding, that when jury was charged partly in the conjunctive, "the state assumed the burden of proving more than the statute required," citing *Staples*); *State v. Azure*, 186 P.3d 1269, 1275 (Mont. 2008) ("where the State has the opportunity to object to a proposed jury instruction before it is given to the jury but fails to do so, that instruction, whether or not it includes an unnecessary element, becomes the law of the case once delivered, and the jury is accordingly bound by it"); *State v. Crawford*, 48 P.3d 706, 711 (Mont. 2002) ("when the State fails to properly object to a jury instruction, the instruction, whether it includes an unnecessary element or not, becomes

the law of the case once delivered, and the jury is accordingly bound by it"); *State v. Hickman*, 954 P.2d 900, 902 (Wash. 1998) ("In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction").

This case is important and worthy of this Court's attention because the issue arises regularly and can be outcome determinative in many cases. Additionally, applying the law of the case is a better rule because it simply holds the government to such burdens as it has assumed when seeking to exercise the weighty power of criminal prosecution. *Williams*, 376 F.3d at 1051 (purpose of law of the case "is to prevent the government from arguing on appeal a position which it abandoned below"). While our Constitution recognizes and seeks to check the tremendous danger involved in the government's power to prosecute and incarcerate its citizens, there are now numerous means by which defendants can forfeit potentially valid claims through procedural default at multiple stages in criminal proceedings. Holding the government to this limited instance of having to comply with additional burdens from jury instructions to which it failed to object not only tends to maintain a proper balance in the procedural rules, it best comports with the Constitution's repeated concern with checking the government's power to take away a person's liberty. If defendants may be required to avoid and survive a host of procedural hurdles in defending their liberty, surely the government should be required to meet such burdens as it has assumed or ac-

quiesced in when not objecting to a jury instruction setting a higher bar than the statute or indictment. *Cf. United States v. Jimenez Recio*, 537 U.S. 270, 279 (2003) (Stevens, J., concurring in part and dissenting in part) ("The prosecutor, like the defendant, should be required to turn square corners.").

This case also is a good vehicle for addressing this split given that the court of appeals recognized that the conjunctive jury instruction was erroneous, recognized the general law-of-the-case rule, and thus the case squarely presents the question regarding the scope of the law-of-the-case doctrine. The fact that the case is unpublished is of no moment given that the rule it is applying was from the published *Guevara* decision and hence is already established precedent in the Fifth Circuit. Indeed, that the court of appeals thought it unnecessary to publish simply confirms that the issue is considered straight-forward and well-established in the circuit.[5]

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[5] This Court also might have the opportunity in this case to provide some guidance on or resolve yet a third circuit split concerning the scope of the "exceeds authorized access" element of the crime alleged in this case. *See supra* at 6-7 n. 1, 8-9. If this Court agrees that the law-of-the-case doctrine applies, it would need to vacate and remand with instructions to consider the sufficiency of the evidence for the "exceeds" element. Indeed, Judge Haynes's concurring view that there was sufficient evidence of exceeding authorized access was expressly based on her taking sides in a circuit split regarding whether an insider can "exceed[] authorized access" by misusing or misappropriating information that the insider was perfectly authorized to access. App. A16 (citing *John*, 597 F.3d 263); *contra United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (*en banc*) (narrow view of "exceeds authorized access" language excluding subsequent misuse of materials *accessed* within authority; noting disagree-

II. The Circuits Are Split Regarding the Reviewability of a Statute-of-Limitations Defense Not Raised at or Before Trial.

On appeal, Petitioner sought to raise a statute-of-limitations defense to Count 2, arguing that the superseding indictments changed the charges, were more than seven years after the events alleged, and hence were barred by the applicable five-year limitations period. *See* Brief of Appellant at 48-50; 18 U.S.C. § 3282. Because the limitations defense was not raised in the district court, Petitioner argued on appeal that it was reviewable under the plain-error standard and that such standard was easily met simply by reviewing the face of the indictments.

The Fifth Circuit declined to reach the merits, holding that "a limitations defense is waived if, as here, it was not raised at trial." App. A8 (citing *Arky*, 938 F.2d at 582).

Whether a limitations defense not raised at or before trial is waived and hence lost forever, or simply forfeited but reviewable for plain error or otherwise,

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ment with Fifth, Seventh, and Eleventh Circuits on this issue); *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199, 203 (4th Cir. 2012) (agreeing with Ninth Circuit and rejecting Seventh Circuit view), *cert. denied*, -- U.S. --, 133 S. Ct. 831 (2013).

Because the government argued on appeal that there was sufficient evidence for both versions of the crime (notwithstanding its admission that it had not indicted Petitioner on the "exceed[ing]" crime), this issue was fully briefed below and would become the primary issue on remand. This Court's guidance on the legal question would add value and be an efficient use of this Court's time and resources.

is the subject of a well-developed circuit split. As the First Circuit recognized in *United States v. Franco-Santiago*, 681 F.3d 1, 12 (1st Cir. 2012), there is an extended split on this issue. One circuit simply permits the issue to be raised for the first time on appeal absent an "explicit waiver." *United States v. Crossley*, 224 F.3d 847, 858 (6th Cir. 2000) ("absent an explicit waiver, the statute of limitations presents a bar to prosecution that may be raised for the first time on appeal"); *United States v. Titterington*, 374 F.3d 453, 455 (6th Cir. 2004) (same, citing *Crossley*), *cert. denied*, 543 U.S. 1153 (2005).

Two circuits, the First and Seventh, allow review for plain-error. *Franco-Santiago*, 681 F.3d at 12 (1st Cir.); *United States v. Baldwin*, 414 F.3d 791, 795 & n.2 (7th Cir. 2005), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007).

Seven circuits, by contrast, hold that simple failure to raise a limitations defense waives it and makes the defense unreviewable on appeal. *United States v. Walsh*, 700 F.2d 846, 855-56 (2d Cir. 1983); *United States v. Castello*, 308 Fed. Appx. 523, 524 (2d Cir. 2009) (unpub.) (applying *Walsh*); *United States v. Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); *United States v. Botsvynyuk*, 552 Fed. Appx. 178, 182 (3d Cir.) (unpub.) (applying *Karlin*), *cert. denied*, -- U.S. --, 135 S. Ct. 187 (2014); *United States v. Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); *United States v. Boccone*, 556 Fed. Appx. 215, 238 n. 6 (4th Cir.) (unpub.) (applying *Williams*), *cert. denied*, -- U.S. --, 135 S. Ct. 169 (2014); *United States v. Arky*, 938 F.2d at 582 (5th Cir); *United States v. LeMaux*,

994 F.2d 684, 689-90 (9th Cir. 1993); *United States v. Wilbur*, 674 F.3d 1160, 1177 (9th Cir. 2012) (citing *LeMaux*); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987); *United States v. Brody*, 705 F.3d 1277, 1284 (10th Cir. 2013) (applying *Gallup*); *United States v. Siegelman*, 561 F.3d 1215, 1232 (11th Cir. 2009), *vacated on other grounds*, 561 U.S. 1040 (2010).

Many of these cases openly acknowledge the split and hence the division among the circuits is well-entrenched and unlikely to be resolved absent this Court's involvement. *E.g.*, *Franco-Santiago*, 681 F.3d at 12; *Baldwin*, 414 F.3d 791, 795 & n. 2; *Arky*, 938 F.2d at 582.

The question presented is worthy of this Court's attention in this case because the split is straightforward, arises regularly, is well-entrenched, and can be outcome determinative. Furthermore, allowing review is the better rule in that prosecutions brought outside the limitations period injure not only the defendant, but the public as well by rendering uncertain a check imposed by Congress on the government's exercise of its power to threaten and take citizens liberty. The prospect that the limitations period may be waived simply encourages the government to file claims outside the limitations period in the hopes that the argument will be waived by overworked defense counsel or that the mere threat of conviction might induce a plea before a potential limitations defense is fully explored. It is the public good that is injured by such incentives for aggressive government prosecution beyond the checks Congress has imposed.

As with the law-of-the-case split, this case is a good vehicle for addressing this issue given that the ruling below squarely relies on well-established circuit precedent, and lacks any confounding issues on the merits of the limitations question. The court of appeals simply never reached the merits.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

A. Fifth Circuit Opinion, Nov. 10, 2014 .....A1-A16

B. District Court for the Northern District of Texas Judgment, Nov. 19, 2013.....B1-B12

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APPENDIX A

2014 U.S. App. LEXIS 21358

United States v. Musacchio

United States Court of Appeals for the Fifth Circuit

November 10, 2014, Filed

No. 13-11294

Before SMITH, BARKSDALE, and HAYNES, concurs, Circuit Judges.

PER CURIAM:*

Michael Musacchio appeals his conviction and sentence for conspiracy and substantive violations of the Computer Fraud and Abuse Act. We affirm.

I.

Musacchio was the president of Exel Transportation Services ("ETS") until he resigned in 2004. ETS is a transportation brokerage company that arranges freight shipments for business clients; it relies on independent agents to sell its services. In 2005, Musacchio founded a competing company, Total Transportation Services ("TTS"), and two ETS employees, Roy Brown and Michael Kelly, **[*2]** followed

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* Pursuant to ***5th Cir. R. 47.5***, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in ***5th Cir. R. 47.5.4***.

him. Beginning in 2006, several agents moved from ETS to TTS.

At about the same time, the new ETS president, Jim Damman, under-took to sign new contracts with agents. He noticed, however, that some agents seemed aware of the new terms before they had been disclosed. One agent revealed Brown had shown him an undisclosed ETS contract addendum; Damman became suspicious and hired a forensic firm to investigate the leak. The firm discovered Musacchio and Brown had been accessing ETS's servers. ETS sued TTS, Musacchio, Brown, and others, and the parties settled for $10 million.

In 2010, the government indicted Musacchio, Brown, and Kelly. Count 1 charged all three with conspiracy to make unauthorized access and exceed authorized access to a protected computer. *See* 18 U.S.C. §§ 371, *1030(a)(2)(C), (c)(2)(B)(i), (iii).* Counts 23 and 24 charged Musacchio with unauthorized access to a protected computer, with Count 23 indicating he accessed the "Exel Server" "[o]n or about" November 24, 2005. *See id. § 1030(a)(2)(C), (c)(2)(B)(i), (iii).* After Brown and Kelly had pleaded guilty, the government filed a superseding indictment against Musacchio in 2012. Count 1 no longer contained the "exceed authorized access" language in the section summarizing the offense, although **[*3]** it did mention exceeding authorized access in the "Object of the Conspiracy" and "Manner and Means" sections. Count 2 was similar to Count 23 of the original indictment but amended the allegations by specifying Musacchio accessed the "Exel email accounts of Exel President and Exel legal counsel" "[o]n or about" No-

vember 23-25, 2005. Count 3 was the same as Count 24 of the original indictment. In 2013, the government filed a second superseding indictment that made no relevant changes.

At trial, the government introduced evidence that, after Musacchio left ETS but before Brown did, Musacchio asked Brown to access other employees' email to collect information. Brown had previously worked in ETS's information-technology department and had the ability, though not the authority, to access other employees' email. Brown complied with Musacchio's requests. After resigning from ETS, Brown used another administrator account to access ETS's servers remotely, and when that stopped working, Kelly provided Musacchio and Brown with other administrator accounts. In addition, the government presented evidence that Kim Shipp, an ETS employee who had been Musacchio's assistant, shared the email of Steve Bowers, **[*4]** an ETS executive, with Musacchio at his request. As Bowers's assistant, Shipp had the authority to access Bowers's email but not to share it with Musacchio.

The government's proposed jury instructions for Count 1 stated the jury had to find Musacchio agreed to "intentionally access[ ] a protected computer(s) without authorization." It did not mention exceeding authorized access. The court revised the instructions, defining the underlying offense as "to intentionally access a protected computer without authorization and exceed authorized access." Neither the government nor Musacchio objected to the conjunctive instructions. The court instructed the jury that its "verdict must be unanimous on each count of the in-

dictment." The jury found Musacchio guilty on all three counts.

The presentence investigation report ("PSR") calculated Musacchio's criminal history category as I and the offense level as 36. A significant component of the latter calculation was an estimate that the loss was $10 million, which increased the offense level by twenty compared to a loss of $5,000 or less. *See* U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 2B1.1(b)(1). Musacchio and the government objected to the loss calculation. Musacchio **[*5]** claimed the forensic firm's fees, $322,000, were a reasonable estimate of the total loss. The government suggested $160 million, which it said was the loss in business value and profits. Two of Musacchio's experts alleged the conspiracy had a negligible impact on agent departures and estimated the loss to be, at most, less than $200,000. Jim Shields, TTS's attorney during the settlement negotiations in the civil case, testified that approximately $135,000 of the $10 million settlement represented ETS's lost profit from agents' departures attributable to the conspiracy. He explained that about $1 million of the settlement represented ETS's total economic loss attributable to the conspiracy and that most of the settlement was driven by TTS's fear of punitive damages. The court found the settlement to be the best of the methodologies presented and calculated the loss as "a million dollars or less, as testified by Mr. Shields."

Musacchio also objected to the PSR's application of a two-level enhancement for sophisticated means. *See id.* § 2B1.1(b)(10)(C). The court rejected his contention, finding that the conspirators' efforts to conceal

their access to ETS's servers constituted sophisticated means.

Based [*6] on these rulings, the court calculated Musacchio's total offense level as 26, resulting in a guideline range of 63 to 78 months. The court imposed concurrent 60-month sentences on Counts 1 and 2 and a consecutive three-month sentence on Count 3.

II.

Musacchio challenges the sufficiency of the evidence on Count 1. The court incorrectly instructed the jury that it had to find that Musacchio had agreed to make unauthorized access *and* exceed authorized access. The statute requires only that he agreed to make unauthorized access *or* exceed authorized access. Musacchio urges that the erroneous instruction became the law of the case, obligating the government to prove he agreed to both elements. He believes the evidence was insufficient to prove he agreed to exceed authorized access. We review *de novo* a properly preserved challenge to the sufficiency of the evidence, *United States v. Brown*, 727 F.3d 329, 335 (5th Cir. 2013), and we "review[] the record to determine whether, considering the evidence and all reasonable inferences in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *United States v. Vargas-Ocampo*, 747 F.3d 299, 303 (5th Cir. 2014) (en banc).

In general, "[a]n instruction that increases the government's [*7] burden and to which the government does not object becomes the law of the case," *United States v. Jokel*, 969 F.2d 132, 136 (5th Cir.

1992), but that rule does not apply where (1) "the jury instruction . . . is patently erroneous and (2) the issue is not misstated in the indictment," *United States v. Guevara*, 408 F.3d 252, 258 (5th Cir. 2005). The *Guevara* exception applies here.

The court instructed the jury that "18 U.S.C. § 1030(a)(2)(C) makes it a crime for a person to intentionally access a protected computer without authorization and exceed authorized access . ." The statute, by contrast, applies to anyone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer." 18 U.S.C. § 1030(a)(2)(C). The replacement of "or" with "and" was an obvious clerical error, not a possible alternative description of the offense.

Nor was the issue misstated in the indictment.[1] The second superseding indictment summarized the offense in Count 1 as "Conspiracy To Make Unauthorized Access to Protected Computer," which correctly described the offense. Although portions of the "Object of the Conspiracy" and "Manner and Means" sections alleged Musacchio agreed to make unauthorized access and exceed authorized access, the government was entitled to make those accusations. It [*8] had to prove Musacchio agreed to make unauthorized access or exceed authorized access; these

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[1] Musacchio tacitly concedes this, noting he "was indicted in Count 1 of the second superseding indictment for conspiracy to make unauthorized access to a protected computer" and referring to the "two superseding indictments which abandoned the 'exceeding authorized access' crime."

statements merely indicated it believed it *could* prove both.

Therefore, *Guevara* controls, and the government was required to prove only that Musacchio agreed to make unauthorized access. Musacchio does not dispute the sufficiency of the evidence on that element, so he cannot prevail on his challenge to the sufficiency of the evidence on Count 1.

III.

Musacchio attacks the jury instructions on Count 1 as plainly erroneous. In his view, the court should have told the jury it had to be unanimous as to one of the two possible elements—making unauthorized access or exceeding authorized access.[2] His concern is that the jury could have been split, with some jurors finding he agreed to make unauthorized access and others finding he agreed to exceed authorized access, but with no unanimous finding on either element.

Where the claim is properly preserved, we review a failure to provide a requested jury instruction for abuse of discretion. *United States v. Grant*, 683 F.3d 639, 650 (5th Cir. 2012). Musacchio did not object to the instruction, so the standard of review is plain error. *See United States v. Valdez*, 726 F.3d 684, 691-92 (5th Cir. 2013). "A plain error is a forfeited error that is clear or obvious and affects the defendant's sub-

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[2] Apparently [*9] Musacchio is taking inconsistent positions on appeal and claiming the jury had to find only one of the two elements. No specific unanimity instruction would have been necessary had the government been required to prove both elements.

stantial rights." *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (per curiam).

"[A] general unanimity instruction is ordinarily sufficient," *United States v. Mason*, 736 F.3d 682, 684 (5th Cir. 2013) (per curiam), but a specific unanimity instruction is sometimes necessary "where there exists a 'genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts,'" *United States v. Holley*, 942 F.2d 916, 926 (5th Cir. 1991) (quoting *United States v. Duncan*, 850 F.2d 1104, 1114 (6th Cir. 1988)). Typically, no specific unanimity instruction is necessary for a conspiracy charge because "the crux of a conspiracy charge . . . [is] [t]he defendant's voluntary *agreement* with another or others to commit an offense." *United States v. Dillman*, 15 F.3d 384, 391 (5th Cir. 1994). A unanimous finding that the defendant agreed to participate in the conspiracy **[*10]** is sufficient. *See id.* at 392.

Dillman forecloses Musacchio's challenge to the jury instructions on Count 1. No specific unanimity instruction was necessary, and the court properly declined to provide one. Further, there was no risk of jury confusion, because the jury found Musacchio guilty of two substantive counts of making unauthorized access. There was no plain error.

IV.

Musacchio claims his prosecution on Count 2 was barred by the statute of limitations. But a limitations defense is waived if, as here, it was not raised at trial. *United States v. Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (per curiam). Musacchio urges that *Arky* does

not apply, because the issue can be resolved based on the face of the indictment. That approach is inconsistent with *Arky* and finds no support in our caselaw.

Musacchio points to *United States v. Shipley*, 546 F App'x 450 (5th Cir. 2013) (per curiam), *cert. denied*, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014), an unpublished opinion, as a case that evaluated a statute-of-limitations defense on the merits even though it was not raised at trial. That is a misreading: *Shipley* explicitly noted the defendant "did not raise [a limitations] argument in the district court," *id.* at 458, and it quoted *Arky*'s rule that "the defendant must affirmatively assert a limitations defense at trial to preserve it for appeal," *id.* (alteration omitted) **[*11]** (quoting *Arky*, 938 F.2d at 582). It then found, "[i]f there was error, it was not plain." *Id.* Although the wording of that conclusion is unusual, *Shipley* did not discuss the merits at all, so the only basis on which it could have rejected the defendant's claim was waiver.

The other case Musacchio cites, *Putman v. United States*, 162 F.2d 903, 903 (5th Cir. 1947) (per curiam), was pre-*Arky* and therefore is not relevant. Moreover, we have previously found waiver based on *Arky* in precisely the situation here—where the issue can be resolved on the face of the indictment. *See United States v. Barakett*, 994 F.2d 1107, 1108-10 (5th Cir. 1993). Accordingly, Musacchio waived his limitations defense by failing to raise it at trial.

V.

Musacchio contends the errors in his trial combined to render it unconstitutionally unfair. Under

the cumulative-error doctrine, "an aggregation of non-reversible errors . . . can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998). Reversal is appropriate only in rare cases where "constitutional errors so 'fatally infect the trial' that they violated the trial's 'fundamental fairness.'" *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004) (quoting *Derden v. McNeel*, 978 F.2d 1453, 1457 (5th Cir. 1992) (en banc)). The only error was instructing the jury that it had to find that Musacchio agreed to make unauthorized access and exceed authorized access. If that error affected the **[*12]** trial at all, it benefited Musacchio and does not justify reversal.

VI.

Musacchio urges that the court miscalculated the loss under the sentencing guidelines. First, he claims the court should have considered only the costs of investigating and remediating the computer intrusion, not business losses. Second, he alleges the court miscalculated the loss even under the government's interpretation of the guidelines.

We review *de novo* interpretations of the guidelines and the method of calculating the loss. *United States v. Nelson*, 732 F.3d 504, 520 (5th Cir. 2013), cert. denied, 134 S. Ct. 2682, 189 L. Ed. 2d 224 (2014). We review factual findings, including the actual calculation of the loss, for clear error. *See id.* "A factual finding is not clearly erroneous as long as it is plausible in light of the record read as a whole." *United States v. Krenning*, 93 F.3d 1257, 1269 (5th Cir. 1996).

The guidelines provide for an offense-level increase based on the loss, defined as "the greater of actual loss or intended loss." U.S.S.G. § 2B1.1 *cmt.* n.3(A). Actual loss is "the reasonably foreseeable pecuniary harm that resulted from the offense," *id. cmt.* n.3(A)(i), while intended loss is "the pecuniary harm that was intended to result from the offense," *id. cmt.* n.3(A)(ii). The guidelines include an additional provision for cases involving computer crimes:

> (v) Rules of Construction in **[*13]** Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:
>
> . . . .
>
> (III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

Id. cmt. n.3(A)(v)(III) (emphasis omitted).

Musacchio's first contention, that only the costs described in the latter provision should have been included, is incorrect. To begin with, his approach is contrary to the guideline language. The use of the

word "includes" in Note 3(A)(v)(III) indicates the loss described in that provision should be considered in addition to actual loss, as defined in Note 3(A)(i).[3] Nothing in Note 3(A)(v)(III) suggests it replaces or limits the general process for calculating loss discussed in Note 3(A)(i)-(ii). **[*14]** The Sentencing Commission's report is consistent with this interpretation. According to the report, Note 3(A)(v)(III) was "designed to *more fully* account for specific factors relevant to computer offenses."[4] The addition of Note 3(A)(v)(III) was necessary because the costs described in that provision otherwise would not have been included in the loss unless they were reasonably foreseeable.

Moreover, the caselaw is contrary to Musacchio's position. The out-of-circuit cases he cites concerning the guidelines, as distinguished from the Act's similarly worded civil provisions, provide little support. **[*15]** Musacchio concedes that *United States v. Batti*, 631 F.3d 371 (6th Cir. 2011), did not directly

---

[3] *See United States v. Baker*, 742 F.3d 618, 622 (5th Cir. 2014) ("[U]se of the word 'including' signals that the cited acts of distribution are illustrative rather than exhaustive." (omission in original) (quoting *United States v. Reingold*, 731 F.3d 204, 228-29 (2d Cir. 2013))); *United States v. Ramos*, 695 F.3d 1035, 1040 (10th Cir. 2012) ("The intent-related examples that the commentary sets forth . . . are preceded by the word, 'including,' suggesting that the list of outlawed conduct is non-exhaustive." (citations omitted)), *cert. denied*, 133 S. Ct. 912, 184 L. Ed. 2d 701 (2013); Black's Law Dictionary 880 (10th ed. 2014) ("The participle *including* typically indicates a partial list.").

[4] U.S. Sentencing Comm'n, Report to the Congress: Increased Penalties for Cyber Security Offenses 1 (2003) (emphasis added).

address how the loss should be calculated, greatly limiting its persuasive value. The decision in *United States v. Schuster*, 467 F.3d 614 (7th Cir. 2006), actually favors the government's position. Musacchio notes that *Schuster* found costs associated with assisting the government should not be considered under Note 3(A)(v)(III) because the Note does not explicitly list them. *See id.* at 619-20. That case did, however, analyze whether those costs should be considered as actual losses, *see id.* at 619, indicating Note 3(A)(v)(III) does not replace or limit the general process for calculating loss set out in Note 3(A)(i)-(ii). *Schuster* characterized the relationship between the two Notes as follows:

> "Actual loss" under the sentencing guidelines, "means the reasonably foreseeable pecuniary harm that resulted from the offense." . . . *Additionally*, in cases involving fraud and related activity in connection with computers, the sentencing guidelines *include* in the calculation of actual loss [the costs described in Note 3(A)(v)(III)], regardless of whether such pecuniary harm was reasonably foreseeable . . . .

Id. at 619 (emphasis added) (quoting U.S.S.G. § 2B1.1 *cmt.* n.3(A)). Under *Shuster*, then, the loss includes both foreseeable harm and the costs listed in **[*16]** Note 3(A)(v)(III). Other cases have interpreted the guidelines similarly.[5] In light of this caselaw and

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[5] *See, e.g., United States v. Willis*, 476 F.3d 1121, 1128-29 (10th Cir. 2007) (including value of information provided to co-conspirator in loss); *United States v. Nosal*, No. CR-08-0237 EMC, 2014 U.S. Dist. LEXIS 4021, 2014 WL 121519, at *8 (N.D.

the guideline language, the court properly considered business losses.

Musacchio's second claim, that the court miscalculated the loss even under the government's interpretation of the guidelines, is equally unavailing. Shields' testimony provided a basis for the finding that the loss was $1 million or less, showing it "is plausible in light of the record read as a whole." *Krenning*, 93 F.3d at 1269. Musacchio criticizes Shields' testimony as "pure speculation," but Shields had knowledge of the loss from the settlement negotiations, and the court was entitled to find his testimony credible and to reject other testimony.[6] Contrary to Musacchio's suggestion, the court was not required to state a precise loss amount but instead needed only to make a reasonable estimate, which it did.[7] As a result, there was no clear error.

Cal. Jan. 13, 2014) (including cost of developing stolen trade secrets in loss).

[6] *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) ("[W]hen a trial judge's finding is based on his decision to credit [*17] the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error."); *United States v. Klein*, 543 F.3d 206, 214 (5th Cir. 2008) ("[T]he finding as to the amount of loss is a factual finding, and we cannot reassess the evidence but owe the finding deference.").

[7] *See United States v. Kennedy*, 726 F.3d 968, 974-75 (7th Cir. 2013) (finding no error in determination that loss exceeded $1 million based on defendant's admission that he purchased counterfeit art for $500,000 and marked it up).

VII.

Musacchio criticizes the application of the sophisticated-means enhancement, claiming his conduct fell short of the sophistication required to trigger it. We review for clear error a determination that a defendant used sophisticated means. *United States v. Roush*, 466 F.3d 380, 387 (5th Cir. 2006). The guidelines provide for a two-level increase where "the offense . . . involved sophisticated means," U.S.S.G. § 2B1.1(b)(10)(C), which "means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense," *id.* § 2B1.1 *cmt.* n.9(B).

Musacchio's efforts to conceal his activities meet this standard. He and his coconspirators used administrator accounts to read ETS employees' email, which concealed **[*18]** their identities. They forwarded the text of the email using webmail accounts in an attempt to avoid leaving records. Though many individuals familiar with computers likely could have developed a similar process, we previously have applied the enhancement "in cases involving some method that made it more difficult for the offense to be detected, even if that method was not by itself particularly sophisticated." *Valdez*, 726 F.3d at 695 (collecting cases). Musacchio's efforts to conceal his activities are similar in complexity to the activities at issue in some earlier cases.[8] Thus, the court did not clearly err by applying the enhancement.

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[8] *See, e.g., United States v. Wright*, 496 F.3d 371, 377-79 (5th Cir. 2007) (in which defendant purchased cashier's checks in borrowers' names to defraud mortgage companies into thinking borrowers had provided funds); *United States v. Clements*, 73

AFFIRMED.

HAYNES, Circuit Judge, concurring:

I concur fully in the judgment of the court. I do not join in the reasoning of Section II of the opinion, however, because I would conclude that the Government sufficiently proved both prongs ("exceeds authorized use" and "unauthorized access") and, therefore would [*19] not reach the issue discussed in Section II. *United States v. John*, 597 F.3d 263, 270-73 (5th Cir. 2010).

F.3d 1330, 1340 (5th Cir. 1996) (in which defendant deposited cashier's checks into wife's account to conceal link between money and himself).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA § JUDGMENT IN A CRIMINAL CASE
§
v. §
§ Case Number: 3:10-CR-00308-P(1)
MICHAEL MUSACCHIO § USM Number: 42493-177
§ **Jay Ethington**
§ Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	One, Two and Three of the Second Superseding Indictment filed on January 8, 2013.

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18:371; 1030(a)(2)(c);(c)(2)(b)(i) And (Iii) Conspiracy To Make Unauthorized Access To Protected Computer	03/01/2006	1ss
18: 1 030(a)(2)(c); (c)(2)(b)(i) And (Iii) Unauthorized Access To Protected Computers	11/25/2005	2ss
18:1030(a)(2)(c); (c)(2)(b)(i) And (Iii) Unauthorized Access To Protected Computers	1/21/2006	3ss

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐The defendant has been found not guilty on count(s)

☐ Count(s)☐is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

B3

September 5, 2013
Date of Imposition of Judgment

s/ Jorge A. Solis
Signature of Judge

Jorge A. Solis, United States District Judge
Name and Title of Judge

Nov.19, 2013
Date

DEFENDANT: MICHAEL MUSACCHIO
CASE NUMBER: 3: 1 O-CR-00308-P(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Sixty (60) months as to count l of the Second Superseding Indictment and Sixty (60) months as to count 2 of the Second Superseding Indictment to run concurrent with each other; and Three (3) months as to count 3 of the Second Superseding Indictment, to run consecutive to Counts 1 and 2 for a total sentence of Sixty-three months.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL MUSACCHIO
CASE NUMBER: 3: 1 O-CR-00308-P(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.)* as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that

may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MICHAEL MUSACCHIO
CASE NUMBER: 3: 1 O-CR-00308-P(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall maintain not more than one business and/or one personal checking account, and shall not open, maintain, be a signatory on, or otherwise use any other financial institution account without the prior approval of the probation officer.

The defendant shall notify the probation officer within 72 hours of acquiring or changing any type of communication device, including pagers, cellular telephones, personal telephones, business telephones, electronic mail addresses, or web addresses.

The defendant shall not transfer, sell, give away, or otherwise convey any asset with a value of $500 or more without the approval of the probation officer.

The defendant shall provide to the probation officer any requested financial information.

DEFENDANT: MICHAEL MUSACCHIO
CASE NUMBER: 3: 1 O-CR-00308-P(1)

CRIMINAL MONETARY PENALTIES

The defendant must a the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$300	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (A0245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fif-

teenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109 A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MICHAEL MUSACCHIO
CASE NUMBER: 3: 1 O-CR-00308-P(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ ____ over a period of _____ *(e.g., months or years),* to commence ____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of$ over a period of _____ *(e.g., months or years),* to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $300.00 for Counts 1, 2 and 3 of the Second Superseding Indictment which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-11294

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

MICHAEL MUSACCHIO,
Defendant-Appellant

On Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion 11/10/14, 5 Cir. ____, ____, F.3d ____)

Before SMITH, BARKSDALE, and HAYNES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P.

and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

s/ Jerry Smith

UNITED STATES CIRCUIT JUDGE

APPENDIX D

Sentencing Transcript (Excerpt)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	) CAUSE NO. 3:10-CR-308-P (1)
	(
vs.	)
	(JULY 3, 2013
	) DALLAS, TEXAS
MICHAEL MUSACCHIO	(1:30 P.M.

SENTENCING
(PART 1)
BEFORE THE HONORABLE JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPEARANCES

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DALLAS, TEXAS 75242
(214) 753-2349

* * *

[Page 4, line 20 through Page 5 line 1]

MS. GROVES: Your Honor, there is a housekeeping matter. The Defense motion for Rule 29 ruling and for a new trial have not been decided yet.

THE COURT: Correct. Remind me of that. And I will get an order out on that, but the motions are denied. I have read your motions and your brief, and those will be denied. I [Page 5] will get a written order out.

* * *

[END EXCERPT]

Supreme Court, U.S.
FILED
MAY 22 2015
OFFICE OF THE CLERK

No. 14-1095

In the Supreme Court of the United States

MICHAEL MUSACCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a sufficiency-of-the-evidence challenge to a criminal conviction is properly analyzed in light of the statutory elements of the offense charged in the indictment, where a jury instruction to which the government did not object added a patently erroneous element to the charged offense.

2. Whether a statute-of-limitations defense is waived on direct appeal, absent good cause, if not raised before trial.

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In the Supreme Court of the United States

No. 14-1095

MICHAEL MUSACCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is not published in the *Federal Reporter* but is reprinted in 590 Fed. Appx. 359.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2014. A petition for rehearing was denied on December 9, 2014 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on March 9, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiracy to access without authorization a protected computer, in vio-

lation of 18 U.S.C. 371 and 18 U.S.C. 1030(a)(2)(C) (2006); and on two counts of the underlying unauthorized-access offense, in violation of 18 U.S.C. 1030(a)(2)(C) (2006). Pet. App. B1-B2. He was sentenced to a total of 63 months of imprisonment, to be followed by three years of supervised release. *Id.* at B3, B5. The court of appeals affirmed. *Id.* at A1-A16.

1. Until 2004, petitioner was president of Extel Transportation Services (ETS), a shipping-logistics company. In 2005, petitioner formed a rival company, Total Transportation Services (TTS). Pet. App. A1; Gov't C.A. Br. 3-4. After recruiting employees in ETS's information-technology department, petitioner accessed ETS's e-mail servers for TTS's benefit. Pet. App. A1-A2; Gov't C.A. Br. 3-6.

In 2010, a grand jury returned an indictment against petitioner charging him with, *inter alia*, (1) conspiracy to obtain unauthorized access to a protected computer and to exceed authorized access to a protected computer, in violation of 18 U.S.C. 371 and 18 U.S.C. 1030(a)(2)(C) (2006); (2) unauthorized access of ETS's e-mail server on or about November 24, 2005, in violation of 18 U.S.C. 1030(a)(2)(C), (c)(2)(B)(i) and (iii) (2006); and (3) unauthorized access of the e-mail account of ETS's legal counsel on or about January 21, 2006, also in violation of 18 U.S.C. 1030(a)(2)(C), (c)(2)(B)(i) and (iii) (2006). Pet. App. A2-A3; Gov't C.A. Br. 6-7.

In 2012, the government filed a superseding indictment clarifying that the conspiracy charge involved unauthorized access to a protected computer and no longer alleging "exceed authorized access" in the count's summary of the offense. Pet. App. A2; see

id. at A2-A3. The superseding indictment also modified the charge relating to petitioner's unauthorized access of ETS's computers in November 2005. Specifically, it identified the targets of the access as the e-mail accounts of ETS's president and legal counsel, and it changed the offense date to on or about November 23 to 25, 2005. *Id.* at A2-A3. In 2013, the government filed a second superseding indictment that kept those changes. *Id.* at A3.

Petitioner proceeded to a jury trial. On the conspiracy count, the district court instructed the jury that 18 U.S.C. 1030(a)(2)(C) (2006), the statute providing the object of the conspiracy, "makes it a crime for a person to intentionally access a protected computer without authorization *and* exceed authorized access." Pet. App. A6 (emphasis added). That jury instruction was erroneous: Section 1030(a)(2)(C) makes clear that a person can violate the statute (1) by intentionally accessing a protected computer without authorization *or* (2) by intentionally exceeding authorized access. 18 U.S.C. 1030(a)(2)(C) (2006); Pet. App. A5; see Pet. 4 (noting that these are "two discrete means of committing the crime).[1] By using the conjunction "and," the instruction appeared to require the government to prove an extra element to establish the crime. Pet. App. A5. Neither the government nor petitioner objected to that error in the charge. *Id.* at A3.

The jury convicted petitioner on all three counts. Pet. App. B1-B2. The district court imposed concur-

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[1] Section 1030(a)(2)(C) provides, in relevant part, that "[w]hoever * * * intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains * * * information from any protected computer * * * shall be punished as provided in [18 U.S.C. 1030(c)]." 18 U.S.C. 1030(a)(2)(C) (2006).

rent terms of 60 months of imprisonment for the conspiracy count and the first unauthorized-access count, and a consecutive term of three months of imprisonment for the remaining unauthorized-access count, to be followed by three years of supervised release. *Id.* at B3, B5.

2. On appeal, petitioner raised two arguments that are relevant to his petition for certiorari. First, petitioner argued that the evidence was insufficient to support his conviction on the conspiracy count. He did not dispute that the evidence was sufficient to prove the charged offense of conspiracy to obtain unauthorized access to ETS's computers. See Pet. App. A5. But he asserted that the erroneous jury instruction was "law of the case" on direct appeal and that the evidence was insufficient to prove a conspiracy to "exceed authorized access" to ETS's computers. *Ibid.* Second, petitioner argued that his prosecution for the November 2005 unauthorized-access offense was barred by the five-year statute of limitations in 18 U.S.C. 3282(a). Pet. App. A8. The court of appeals rejected those arguments and affirmed the conviction in an unpublished, per curiam opinion. *Id.* at A1-A15.

a. The court of appeals declined to apply law-of-the-case principles to evaluate his challenge to the sufficiency of the evidence under a patently incorrect jury instruction. Pet. App. A5-A7. The court acknowledged that, "[i]n general," unobjected-to jury instructions that increase the government's burden are generally treated as "law of the case" on direct appeal. *Id.* at A5-A6 (citing *United States* v. *Jokel*, 969 F.2d 132, 136 (5th Cir. 1992) (per curiam)). But the court also noted that this rule does not apply where (1) the jury instructions are "patently errone-

ous," and (2) "the issue is not misstated in the indictment." *Id.* at A6 (quoting *United States* v. *Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), cert. denied, 546 U.S. 1115 (2006)).

The court of appeals explained that both of those conditions were satisfied here. The court noted that the second superseding indictment correctly stated the conspiracy charge, and it emphasized that the jury instructions incorrectly required the government to prove both that petitioner had conspired to access a computer without authorization *and* that petitioner had conspired to exceed authorized access. Pet. App. A5-A7. The court observed that the instruction's "replacement of 'or' with 'and' was an obvious clerical error, not a possible alternative description of the offense." *Id.* at A6. The court noted that petitioner "does not dispute the sufficiency of the evidence" with respect to unauthorized access of the computers at issue, and it rejected petitioner's insufficiency challenge on that basis. *Id.* at A7.[2]

b. The court of appeals also rejected petitioner's statute-of-limitations argument with respect to the November 2005 unauthorized-access offense. Pet. App. A8-A9. The court explained that petitioner had waived any statute-of-limitations defense by failing to raise it at trial. *Ibid.* (citing *United States* v. *Arky*,

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[2] Judge Haynes concurred in the court of appeals' judgment with respect to the conspiracy charge, but declining to address the merits of petitioner's "law of the case" argument. Pet. App. A16. She held that even if the jury instruction was binding, the evidence was sufficient to establish that petitioner violated "both prongs ('exceeds authorized use' and 'unauthorized access')" of Section 1030(a)(2)(C). *Ibid.*

938 F.2d 579, 582 (5th Cir. 1991) (per curiam), cert. denied, 503 U.S. 908 (1992)).

ARGUMENT

Petitioner contends (Pet. 10-24) that the court of appeals erred by rejecting his sufficiency-of-the-evidence and statute-of-limitations claims. Neither issue warrants this Court's review.

1. Petitioner argues (Pet. 10-20) that the evidence was insufficient to support his conviction for conspiracy to violate 18 U.S.C. 1030(a)(2)(C) (2006). Specifically, he asserts (Pet. 19-20) that under the "law of the case" doctrine, the government should be held to an extra, erroneous element in the jury instructions that required the government to establish that he conspired to exceed authorized access, even though he concedes that the evidence was sufficient support the jury's finding that he conspired to obtain unauthorized access. See Pet. App. A5, A7. Petitioner is wrong to argue that the sufficiency of the evidence in this case must be measured against the erroneous but unobjected-to jury instruction, instead of against the statutory elements of the crime. The judgment of the court of appeals is correct, and no clear split of authority among the courts of appeals warrants this Court's review.

a. When a criminal defendant challenges a conviction on grounds of insufficient evidence, a reviewing court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The purpose of that analysis is "to guarantee the fundamental protection of due process of law," *ibid.* (foot-

note omitted), by ensuring that the defendant's guilt has been established by "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 358, 364 (1970).

Here, petitioner was charged with conspiracy to gain unauthorized access to a protected computer, in violation of 18 U.S.C. 371 and 18 U.S.C. 1030(a)(2)(C) (2006). Pet. App. A2-A3; Second Superseding Indictment 4 (Jan. 8, 2013). Section 1030 (a)(2)(C) provides, in relevant part, that "[w]hoever * * * intentionally accesses a computer without authorization * * * and thereby obtains * * * information from any protected computer * * * shall be punished as provided in [18 U.S.C. 1030(c)]." 18 U.S.C. 1030(a)(2)(C) (2006).

Petitioner does not dispute that the evidence was sufficient to establish that he conspired to intentionally access a computer without authorization and thereby obtained information from that protected computer. Pet. App. A5, A7. Nor does he dispute that the jury instructions correctly required the jury to find that the government had established each of these statutory elements. See Pet. 5-6. The jury therefore "could have found"—and did find—"the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. Petitioner's conviction on the conspiracy charge was consistent with due process of law, and the court of appeals' judgment upholding that conviction was correct.

b. Petitioner argues (Pet. 19-20) that the evidence was insufficient *not* because the government failed to establish the statutory elements of the offense, but rather because the government failed to establish an extra element that was erroneously included in the

jury instructions. According to petitioner (Pet. 19-20), the government's failure to object to the erroneous instruction rendered that instruction the "law of the case," and heightened the government's burden, on appellate review for purposes of considering the sufficiency of the evidence on appeal.

Petitioner is mistaken. In *United States* v. *Wells*, 519 U.S. 482 (1997), this Court acknowledged that several courts of appeals had ruled that "when the [g]overnment accepts jury instructions treating a fact as an element of an offense, the 'law of the case' doctrine precludes the [g]overnment from denying on appeal that the crime includes the element." *Id.* at 487.[3] But the Court nonetheless held that the law-of-the-case doctrine did not preclude the government from arguing that materiality was not an element of the offense of making false statements to a bank, in violation of 18 U.S.C. 1014, even though the government had asked the district court to instruct the jury that withholding a "material" fact made a statement false, thus effectively treating materiality as an "element." *Wells*, 519 U.S. at 485-488 & nn.4-5. The Court explained that, whatever utility the "law of the case" doctrine may have for the courts of appeals, it is insufficient to prevent the Court from applying its traditional rule permitting review of a legal issue that had been resolved in the court of appeals. *Id.* at 487-488.

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[3] This Court observed that "[i]n this context, the 'law of the case' doctrine is something of a misnomer. It does not counsel a court to abide by its own prior decision in a given case, but goes rather to an appellate court's relationship to the court of trial." *Wells*, 519 U.S. at 487 n.4 (citing 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4478 (1st ed. 1981)).

Both the holding and rationale of *Wells* are inconsistent with petitioner's argument that the government is categorically required to show that the evidence at trial was sufficient to prove an extra offense element that was erroneously included in the jury instructions. On the contrary, *Wells* suggests that the law-of-the-case doctrine is best viewed as a prudential measure that appellate courts may, but are not required to, apply depending on the particular context at issue.

No reason exists to apply the law-of-the-case doctrine when a criminal defendant seeks to overturn a conviction by claiming that the prosecution introduced insufficient evidence to prove a non-element. Congress defines the elements of a criminal offense, not courts or prosecutors. See, *e.g.*, *Whalen* v. *United States*, 445 U.S. 684, 689 (1980). The public interest in the just administration of the criminal law favors adhering to the due process standard embraced in *Jackson*, which focuses on whether the trial evidence is sufficient to prove the elements of an offense. "A defendant has no due process right * * * to proof beyond a reasonable doubt of elements *not* necessary to constitute the crime charged, including elements erroneously or unnecessarily charged to the jury." *United States* v. *Inman*, 558 F.3d 742, 748 (8th Cir.), cert. denied, 558 U.S. 916 (2009). Sufficiency-of-the-evidence review should hew to the elements as Congress defined them, and a defendant should not be entitled to acquittal—foreclosing any subsequent prosecution—when the government has proved the statutory elements of the offense.[4]

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[4] If the inclusion of the erroneous element prejudiced the defendant's defense by confusing the jury, a defendant might be able

c. Even if it were proper for the courts of appeals to hold that—in general—the law-of-the-case doctrine requires the government to satisfy jury instructions to which it has acquiesced, that rule should not apply when the instructions contain an obvious mistake and no prejudice would result to the defendant. As this Court has explained, the law-of-the-case doctrine "directs a court's discretion, it does not limit the tribunal's power." *Pepper* v. *United States*, 562 U.S. 476, 506 (2011) (quoting *Arizona* v. *California*, 460 U.S. 605, 618 (1983)). Crucially, the doctrine "does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice." *Id.* at 506-507 (quoting *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997)) (internal quotation marks and brackets omitted).

The court of appeals' decision below is consistent with those principles. The court upheld petitioner's conviction after concluding that (1) the crime was properly charged in the indictment; (2) the extra element included in the jury instructions was patently erroneous; (3) the instructions required the jury to find that the government had established all of the actual, statutory elements of the offense; and (4) the evidence was sufficient for the jury to find that petitioner committed all of those statutory elements. Pet. App. A6-A7. The court of appeals recognized that the

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to argue that he should receive a new trial. See *United States* v. *Zanghi*, 189 F.3d 71, 80 n.11 (1st Cir. 1999) (patently erroneous jury instruction could "infect the charge" and confuse the jury on the elements so as to warrant relief on plain-error review), cert. denied, 528 U.S. 1097 (2000). But an outright acquittal because the government did not prove an element that it was not required to prove is not justified.

jury instruction's inclusion of an extra element reflected "an obvious clerical error," *id.* at A6, and it properly declined to consider the extra element when assessing the sufficiency of the evidence. Justice would not be served by granting petitioner an acquittal despite the sufficiency of the evidence to support the jury's finding that he committed every statutory element of the crime.[5]

Petitioner urges (Pet. 19-20) this Court to embrace a categorical law-of-the-case rule under which a criminal defendant is always entitled to a judgment of acquittal if the government fails to prove an element erroneously included in the jury instructions without objection from the government. He argues (*ibid.*) that because a defendant may sometimes "forfeit potentially valid claims through procedural default at multiple stages in criminal proceedings, * * * surely the government should be required to meet such burdens as it has assumed or acquiesced in when not objecting to a jury instruction setting a higher bar than the statute or indictment."

Petitioner's rationale for his proposed categorical rule does not withstand scrutiny. It is true that some claims are waived when a defendant does not object at the appropriate time. But under Federal Rule of Criminal Procedure 52(b), a defendant may be able to

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[5] Other courts of appeals have likewise recognized that erroneous jury instructions should not become the law of the case in similar circumstances. See *Inman*, 558 F.3d at 748; *United States* v. *Sisk*, 87 Fed. Appx. 323, 328 (4th Cir. 2004) (per curiam) (unpublished); *Zanghi*, 189 F.3d at 79 (explaining that jury instruction is not law of the case when it is "patently incorrect or internally inconsistent"); see also *United States* v. *Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), cert. denied, 546 U.S. 1115 (2006).

obtain redress for a plain error that affects his substantial rights—including an erroneous jury instruction—even though the defendant failed to object to that error at the appropriate time. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 465-466 (1997). One ingredeient of such a claim is that an error is obvious. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993); see also *Henderson* v. *United States*, 133 S. Ct. 1121, 1126 (2013). Just as forfeiture does not preclude relief for a defendant in all circumstances of clear error, the court of appeals' approach recognizes that in certain instances of clear error, the government will not be foreclosed from urging an appellate court to apply the correct rule of law.

d. Petitioner is wrong to suggest (Pet. 11-16) that this Court's intervention is warranted to resolve a clear division of authority among the courts of appeals on the law-of-the-case issue.

Petitioner asserts (Pet. 11) that the Eighth Circuit —unlike the First and Fifth Circuits—"appl[ies] the law-of-the-case doctrine in the same circumstances [as present here] to hold the government to any heightened burden imposed by jury instructions to which it did not object." That is not correct. As petitioner himself later acknowledges (Pet. 13-15), the Eighth Circuit's decision in *Inman* rejects that approach. There, the court explained that a defendant lacks any due process right to proof beyond a reasonable doubt "of elements *not* necessary to constitute the crime charged, including elements erroneously or unnecessarily charged to the jury." 558 F.3d at 748. It refused to apply the law-of-the-case doctrine in the manner now proposed by petitioner, and it instead "review[ed] the sufficiency of the evidence according to

the element *as defined by statute and charged in the indictment*"—not as presented in the erroneous jury instructions. *Id.* at 750 (emphasis added); see *id.* at 748.[6]

Petitioner asserts (Pet. 11-13) that the Eighth Circuit applied his preferred approach in several cases decided before *Inman*, namely *United States* v. *Torres-Villalobos*, 487 F.3d 607, 611 n.1 (2007), *United States* v. *Staples*, 435 F.3d 860, 866-867, cert. denied, 549 U.S. 862 (2006), and *United States* v. *Ausler*, 395 F.3d 918, 920, cert. denied, 549 U.S. 861 (2005). But *Torres-Villalobos* did not involve a sufficiency-of-the-evidence challenge, but instead only a dispute over whether certain evidence was properly admitted, and the court had no occasion to consider whether the

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[6] Unlike this case, *Inman* involved a circumstance in which the jury charge—in addition to including a non-statutory element—also omitted a statutory element of the offense. See 558 F.3d at 746-747 (explaining that instructions included a non-statutory element (that the materials containing the child pornography was produced using materials that had been shipped in interstate commerce) *and* excluded a statutory element (a requirement that the materials used to produce the child pornography was itself shipped in interstate commerce)). In that circumstance, the court of appeals held that

> where a statutory element of an offense is included in the indictment but erroneously omitted from instructions to the jury, and the evidence is insufficient to establish the unobjected-to [non-statutory] element used instead, the conviction may be affirmed against a sufficiency challenge where the evidence is so overwhelming or incontrovertible that there is no reasonable doubt that any rational jury would have found that the government proved the statutory element.

Id. at 749. This case is easier than *Inman*, insofar as the jury instructions expressly required the jury to find *all* statutory elements of the offense beyond a reasonable doubt.

"clear error" exception to the law-of-the-case doctrine should apply. See 487 F.3d at 611 n.1. And *Inman* itself distinguished *Staples* and *Ausler* on the grounds that neither of those cases involved instances where the trial evidence was sufficient only to support a conviction for the offense under the relevant statute, but not the offense set forth in the jury instructions. *Inman*, 558 F.3d at 749-750 & n.5.

Petitioner also invokes (Pet. 14-15) the Eighth Circuit's post-*Inman* decision in *United States* v. *Johnson*, 652 F.3d 918 (2011). But as petitioner himself concedes (Pet. 15), that case—like *Inman* itself—rejected the categorical law-of-the-case rule that he urges the Court to embrace here. See *Johnson*, 652 F.3d at 922-924. And *Johnson* differs significantly from this case because the instructions there did not cover the correct statutory elements.[7] In any event, even if petitioner were correct (Pet. 11-16) that the Eighth Circuit cases addressing this issue are in ten-

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[7] As in *Inman*, the jury instructions in *Johnson* erred by both omitting a statutory element and including a non-statutory element. See *Johnson*, 652 F.3d at 922-924; note 6, *supra*. On those facts, *Johnson* declined to follow what it described as the rule embraced by First and Fifth Circuits, under which the court would simply consider whether the evidence would have been sufficient to establish the defendant's guilt if the jury instructions had been correct. 652 F.3d at 923-924. Notably, however, the *Johnson* court rejected that alternative standard in light of (1) the due process requirement that the prosecution prove all elements of a crime beyond a reasonable doubt, and (2) the Sixth Amendment requirement that the jury, not the judge, make the requisite findings of guilt. *Ibid.* Neither of those constitutional considerations are present in the circumstances presented here, where—unlike in both *Inman* and *Johnson*—the jury was required to find that petitioner committed all statutory elements of the crime. See note 6, *supra*.

sion with one another, "[i]t is primarily the task of a [c]ourt of [a]ppeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner also asserts (Pet. 16) a conflict with the Tenth Circuit's decision in *United States* v. *Romero*, 136 F.3d 1268 (1998). There, the government argued that it did not need to present evidence on a offense element that—according to the government—was not required by the statute and yet was erroneously included in the jury instructions. *Id.* at 1271-1274. The court of appeals rejected that argument. *Id.* at 1271. It interpreted this Court's decision in *Wells* to "h[o]ld that adherence to the law of the case doctrine at the circuit level is a matter left to the discretion of the circuit courts." *Id.* at 1272. The court of appeals then applied that doctrine and reversed the conviction on the ground that government had failed to present any evidence with respect to the disputed element of the crime. *Id.* at 1273-1274.

Romero's analysis is not necessarily inconsistent with the rule embraced by the First and Fifth Circuits. As the First Circuit explained in *United States* v. *Zanghi*, 189 F.3d 71 (1999), cert. denied, 528 U.S. 1097 (2000), "*Romero* is distinguishable because the instruction in that case was not 'patently erroneous' in light of the statutory requirements," and "[i]n fact, it may have been legally correct." *Id.* at 80 n.10; see *Romero*, 136 F.3d at 1271 (emphasizing that the dispute over the elements of the offense "raise[s] some very difficult federal Indian law questions"); see also *United States* v. *Prentiss*, 256 F.3d 971, 976-977 (10th Cir 2001) (en banc) (per curiam) (subsequently holding that, contrary to the government's argument in

Romero, the disputed element *is* a statutory element of the relevant offense). *Romero* was plainly not a case like this one, where the parties agree that the jury instruction was erroneous and where the court of appeals expressly held that it contained an "obvious clerical error." Pet. App. A6.

Notably, none of the Tenth Circuit decisions applying *Romero* has considered whether to recognize an exception to the law-of-the-case doctrine in circumstances where the offense was properly charged in the indictment and the jury instruction was patently erroneous. Indeed, the government has not yet urged it to do so. See *United States* v. *Kamahele*, 748 F.3d 984, 1003 n.13 (10th Cir. 2014). Such an exception would be consistent with the settled principle—embraced by both this Court and the Tenth Circuit—that the law-of-the-case doctrine does not apply when a prior ruling "is clearly erroneous and would work a manifest injustice." *Pepper*, 562 U.S. at 506-507 (citations omitted); see *Arizona*, 460 U.S. at 618 n.8; *Bishop* v. *Smith*, 760 F.3d 1070, 1086 (10th Cir.), cert. denied, 135 S. Ct. 271 (2014); *Johnson* v. *Champion*, 288 F.3d 1215, 1226 (10th Cir. 2002). Until the Tenth Circuit has had occasion to consider that exception to law-of-the-case principles in the particular context at issue here, any claim of a square conflict would be premature.

2. Petitioner also seeks (Pet. 21-24) review of the court of appeals' holding that he waived his statute-of-limitations challenge to his conviction for accessing a protected computer in November 2005 without authorization. Petitioner concedes (Pet. 21) that he did not raise the limitations defense in the district court, but he argues that the court of appeals should have ap-

plied plain-error review to address the district court's failure to sua sponte instruct the jury on that issue.

Petitioner is incorrect. This Court has held that the "statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases." *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917) (citing *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872)). Although the statute of limitations "may inhibit prosecution, it does not render the underlying conduct noncriminal." *Smith* v. *United States*, 133 S. Ct. 714, 720 (2013). It is not an element of the underlying offense, and the government is not required to allege the time of the offense in the indictment. *Ibid.* Rather, "it is up to the defendant to raise the limitations defense." *Ibid.*

As petitioner acknowledges (Pet. 22-23), a majority of courts of appeals have taken the position that a criminal defendant's failure to raise a statute-of-limitations defense waives that defense and makes it unreviewable on appeal. See *United States* v. *Franco-Santiago*, 681 F.3d 1, 12 n.18 (1st Cir. 2012) (collecting cases). A minority of courts of appeals, however, have treated the failure to raise a statute-of-limitations issue at trial as forfeiture, rather than as waiver of an affirmative defense, and have thus applied plain-error review under Federal Rule of Criminal Procedure 52(b). *Ibid.* Despite the conflict of authority, this Court has previously denied review of this issue. See *Ciavarella* v. *United States*, 134 S. Ct. 1491 (2014) (No. 13-7103); *Berry* v. *United States*, 533 U.S. 953 (2001) (No. 00-8761).

This case is a poor vehicle for addressing the conflict among the circuits because the choice of approaches is not outcome-determinative. Even assum-

ing that petitioner could raise the affirmative statute-of-limitations defense for the first time after trial, he would not be entitled to relief. Under Rule 52(b),

> an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

United States v. *Marcus*, 560 U.S. 258, 262 (2010) (brackets in original) (quoting *Puckett* v. *United States*, 556 U.S. 129, 135 (2009)).

Petitioner cannot satisfy any of those requirements because his statute-of-limitations defense lacks merit. The original indictment was timely filed in 2010, within five years of the unauthorized-access offense. Pet. App. A2; Indictment 1 (Nov. 2, 2010); see 18 U.S.C. 3282(a). In 2012, the government filed a superseding indictment modifying the relevant count only by (1) no longer alleging "exceed authorized access" in the conspiracy count's summary of the offense; (2) changing the offense date from on or about November 24, 2005, to on or about November 23 to 25, 2005; and (3) changing the point of access from ETS's e-mail server to two e-mail accounts on the server. Pet. App. A2-A3; Indictment 25; First Superseding Indictment 23 (Sept. 6, 2012). In 2013, the government filed a second superseding indictment that made "no relevant changes" to the charge. Pet. App. A3.

Below, petitioner argued that the superseding indictments were outside the five-year statute of limitations because they changed the charges against him. Pet. C.A. Br. 48-50. But that argument is plainly incorrect. A superseding indictment relates back to the original indictment so long as it does not "broaden[] or substantially amend[] the charges made in the original indictment." *United States* v. *Schmick*, 904 F.2d 936, 940 (5th Cir. 1990), cert. denied, 498 U.S. 1067 (1991). The change in date—from "[o]n or about" November 24, 2005 to "[o]n or about" November 23 to 25, 2005)—did not meaningfully broaden the charges. Indictment 25; First Superseding Indictment 23. And the greater specificity provided in the superseding indictment—including by referring to two specific email accounts on the ETS server, instead of to the server as a whole—made the charges narrower, not broader. *Ibid.*

In those circumstances, there was no error, much less a "clear or obvious" error that affected the outcome of the proceedings or impugned the fairness or integrity of judicial proceedings more generally. *Marcus*, 560 U.S. at 262. Petitioner would therefore not be able to obtain relief even if he could prevail on the question presented to this Court. Further review of petitioner's statute-of-limitations challenge is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 14-1095

In The
Supreme Court of the United States

MICHAEL MUSACCHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment?

2. Whether a statute-of-limitations defense not raised at or before trial is reviewable on appeal?

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This case presents two clean and well-developed splits and an option to resolve yet a third split. The government makes only a limited and erroneous attempt to mitigate the first split, concedes the second split, and fails to respond regarding the potential third split. The government instead directs most of its efforts to arguing that it should win on the merits of the first split and would win on remand under the second. Such posturing regarding the merits or remand issues not addressed below does not diminish the existence or importance of these splits, the regularity with which they arise, or the quality of this case as a vehicle for resolving them. Indeed, with such professed confidence, the government should be glad of the opportunity to resolve the splits rather than run from the opportunity to do so. Given the conflict in the circuits, this Court's institutional goal of uniformity in the law would be satisfied regardless of the outcome on the merits. And Petitioner is confident he can more than adequately defend those many courts on the other side of the split that disagree with the government's view of the merits.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split Regarding the Scope of the Law-of-the-Case Doctrine as Applied to Extra-Statutory Elements Included in Jury Instructions.

As the Petition explained, at 10-16, there is a clean split between the Fifth and First Circuits on one side and the Eighth and Tenth Circuits on the other regarding whether the law-of-the-case doctrine can bind the government to an erroneously added addi-

tional element to which the government did not object. There also are numerous cases from other courts addressing the same issue and, in many cases, taking sides in the split. Pet. 17-19. Such cases demonstrate that the issue arises regularly, makes the outcome of a case depend on the venue in which it is tried, and hence warrants this Court's review.

The government offers relatively little to challenge the value of granting certiorari. After a lengthy protest that the Fifth Circuit side of the split is correct on the *merits*, the government attempts to distinguish several of the cases on the other side of the split. Such purported distinctions are mistaken.

For example, the government, at 12-13, denies a split with the Eighth Circuit by citing to *United States v. Inman*, 558 F.3d 742, 748 (8th Cir.), *cert. denied*, 558 U.S. 916 (2009), and claiming that the case refused to apply the law-of-the-case doctrine. *Inman*, however, was discussed at length in the Petition, is inaccurate and inconsistent in its own description of Eight Circuit law, and *still* conflicts with the First and Fifth Circuits regardless whether it unilaterally modified established Eighth Circuit precedent. *See* Pet. 13-16 (discussing *Inman* and the post-*Inman* case of *United States v. Johnson*, 652 F.3d 918, 922 (8th Cir. 2011), which continued to rely on pre-*Inman* cases and rejected the First and Fifth Circuit rule).

The government also briefly claims, at 13-14, that the earlier Eighth Circuit cases applying the law-of-the-case doctrine can be distinguished as involving evidence sufficient under *any* standard and hence not

genuinely raising the split. That claimed distinction is incorrect.

United States v. Staples, 435 F.3d 860, 866-67 (8th Cir.), *cert. denied*, 549 U.S. 862 (2006), applied the law-of-the-case doctrine in circumstances identical to those here. Although the evidence against one defendant was weak on both conjunctively instructed elements, the court recognized that the case for one of the two elements – and all that the statute disjunctively required – was "stronger with respect to" a co-defendant. *Id.* at 868. The court nonetheless reversed as to that co-defendant precisely because the government could not establish the second, erroneously instructed in the conjunctive, element. The law-of-the-case doctrine was squarely applied, was outcome determinative, and would not have been applied in the First or Fifth Circuits.

United States v. Ausler, 395 F.3d 918, 920 (8th Cir.), *cert. denied*, 546 U.S. 861 (2005), also explicitly adopted and applied the law-of-the-case rule to an additional element – knowledge of the *specific type* of controlled substance – that was not required by statute. There was no dispute that the defendant knew he possessed a controlled substance as a general matter – all that the statute itself required – as he did not even appeal the first count of his conviction. *Id.* at 919. The only reason he even had a viable appeal on the second count was his claim that there was insufficient evidence to show he *knew* he also had a second form of the drug, *i.e.*, the erroneously added element required by the jury instructions. *Id.* at 920. The court accordingly proceeded to measure sufficiency of the evidence for the second count against the

higher standard set forth in the jury instructions. Having expressly applied the more stringent law-of-the-case standard, the fact that the court ultimately affirmed the conviction does not convert its ruling into dicta. Indeed, *Ausler* continues to be cited in the Eighth Circuit for its the law-of-the-case holding.

Regarding *United States v. Torres-Villalobos*, 487 F.3d 607, 611 n. 1 (8th Cir. 2007), the government argues that it did not involve a sufficiency-of-the-evidence challenge or the "clear error" exception created in the First and Fifth Circuits. The Eighth Circuit recognized however, that the instruction was plainly erroneous in exactly the same way as the instruction in this case – it took a statutory "or" between two elements and instructed the jury with a conjunctive "and" requiring proof of both elements. *Id.* That the argument arose in the context of admissibility rather than sufficiency is irrelevant given that the rule applied was the identical *Staples* rule and the error was exactly as plain as here.

Finally, the government, at 14, seeks to distinguish the post-*Inman* case of *United States v. Johnson*, 652 F.3d 918, 922 (8th Cir. 2011), as involving the double error of omitting as well as adding an element. While *Johnson* indeed involved two different types of instructional error, there is no disagreement that the *omission* of a required statutory element does not become law of the case. But on the converse issue of whether an *additional* required element may become law of the case absent objection by the government, *Johnson* unambiguously continues the split sought to be resolved here. It rejects the First and Fifth Circuit rule and relies on both *Ausler* and the

Tenth Circuit's *United States v. Williams*, 376 F.3d 1048, 1051 (10th Cir. 2004), both of which are squarely part of the split. 652 F.3d at 922-23 & n. 2.

At the end of the day, whatever temporary confusion *Inman* may have created in the Eighth Circuit, *Staples*, *Ausler*, and *Torres-Villalobos* remain good law, continue to be cited by Eighth Circuit cases, and thus are sensibly viewed as part of the established split. And even if there is still debate in the Eighth Circuit between the approach used in *Ausler/Staples* and the approach in the *Inman/Johnson* line, *both* approaches conflict with the First and Fifth Circuit rule and hence such *intra*-circuit debate does nothing to diminish the *inter*-circuit conflict.

Regarding the Tenth Circuit's decision in *United States v. Romero*, 136 F.3d 1268, 1272-73 (10th Cir. 1998), the government merely repeats the First Circuit's empty attempt to distinguish that case. BIO 15 (citing *United States v. Zanghi*, 189 F.3d 71, 79-80 (1st Cir. 1999), *cert. denied*, 528 U.S. 1097 (2000)). That false distinction was discussed in the Petition, at 18 n. 4, and ignores what the Tenth Circuit actually said. The *Romero* court *assumed* the error of the additional element, found such error irrelevant, applied the law of the case, and held that it was "compelled to find that Romero's conviction must be overturned because of the Government's failure to prove an element of the crime as charged to the jury." 136 F.3d at 1271. It is merely wishful thinking to imagine the Tenth Circuit would suddenly adopt a different rule if only the error were more plain. Certainly no Tenth Circuit case has ever suggested as much.

Ignoring the further Tenth Circuit *Williams* case 376 F.3d at 1051, discussed in the Petition, at 16, the government instead seeks to distinguish an irrelevant Tenth Circuit case in which the government neglected to challenge the law-of-the-case doctrine at all. BIO at 16 (citing *United States v. Kamahele*, 748 F.3d 984, 1003 n. 13 (10th Cir. 2014)). But the government's failure consistently to assert its legal position regarding the law of the case surely has no bearing on the law in the Tenth Circuit, the continued applicability of *Romero* and *Williams*, and hence the problematic existence of a split. Speculation that the government might someday seek to revisit established law in the Tenth Circuit does not diminish the genuineness of the split or the need for review by this Court. Indeed, the very fact that the government neglected to make such an argument in *Kamahele* more likely suggests that it recognized the futility of challenging longstanding circuit precedent and thus corroborates the existence of an established and entrenched split.

Turning briefly to the government's premature merits arguments, none of them is a reason to deny certiorari. The primary issue at the Petition stage is the existence and importance of a split, not how this Court might resolve that split on the merits. Even were the government correct in its merits arguments – and it most certainly is not – that simply means that half the courts in the split are getting it wrong. It does not matter for present purposes which side of the split is eventually found to have the better argument. What matters *now* is the existence of such dis-

agreement and hence the non-uniform administration of justice in the federal courts.

Regarding that issue, the government does seem to suggest, at 8-9, that application of the law-of-the-case doctrine is merely an internal discretionary matter for the circuits, citing this Court's discussion in *United States v. Wells*, 519 U.S. 482, 487-89 (1997) of whether a newly raised law-of-the-case claim could bar this Court's review of an issue properly raised and decided in the appellate court and included in the granted Petition. Not surprisingly, this Court rejected the respondents' last-minute effort to assert the law-of-the-case doctrine for the first time in this Court. Indeed, the law-of-the-case doctrine was not even discussed in the circuit decision in *Wells* – presumably because it was not raised as a bar to the government's change of position. *See United States v. Wells*, 63 F.3d 745, 748-50 (8th Cir. 1995) That is precisely why the court of appeals actually reached and decided the question whether materiality was a substantive element of the offense in that case. This Court's defense of its own authority to decide an issue raised and decided below, and preserved in the Petition, had more to do with the procedural posture of the case and the last minute attempt to torpedo a question properly granted by this Court.

Wells does not represent a general comment on whether the law-of-the-case doctrine can bind the government when properly raised and argued, nor on whether it is the type of outcome-determinative rule that should be made uniform throughout the circuits as advocated here. Rather, the discussion in *Wells* was no more than a rebuke of a last-minute tactic by

the respondents to deny this Court the ability to hear a question properly granted. There is nothing in *Wells* to suggest, as the government does, BIO 9, that requiring the government to satisfy jury instructions containing an additional burden to which the government has acquiesced is merely a discretionary or prudential doctrine that may be applied or ignored by circuit courts at their pleasure.

As for the actual merits of the question presented, suffice it to say that multiple courts disagree with the government on this issue and Petitioner will happily defend the reasoning of those courts. Holding the government to a higher standard set by jury instructions to which it did not object is a perfectly fair, appropriate, and equitable check on the government's exercise of the enormous power of prosecution. There is nothing at all unjust about holding the government to its own assumed burdens and, indeed, the very nature of our system is designed to make it difficult for the government to take away the liberty of its citizens. Statutory definitions of crimes set the minimum bar for taking away a person's liberty, but they most certainly do not set the maximum bar as well.

Indeed, even the First and Fifth Circuits, and the government itself, accept the law-of-the-case rule when the jury instruction does not involve "plain" error but nonetheless incorrectly adds an extra-statutory element. *See* Pet. App. A5-A6 (citing *United States v. Jokel*, 969 F.2d 132, 136 (5th Cir. 1992), for the general law-of-the-case rule that continues to apply in the Fifth Circuit in circumstances not satisfying the *Guevara* exception). Yet every aspect of the government's merits argument applies equally in

such circumstances, not merely where the error is "plain." In such instances the government still must prove more than required by the statute, and a defendant may still be acquitted if the government fails to meet the extra-statutory burdens it has assumed. Short of abandoning the law-of-the-case doctrine in all its applications, which neither the government nor any circuit has suggested, the government's position is inherently contradictory.

If this Court grants certiorari here, Petitioner is more than ready, willing, and able to argue the merits on full briefing. Suffice it to say, the government protests too much about its anticipated victory and, in attempting to forestall this Court's review, perhaps reveals that it is less confident of the outcome on the merits than its bravado suggests. [1]

II. The Circuits Are Split Regarding the Reviewability of a Statute-of-Limitations Defense Not Raised at or Before Trial.

The government, at 16-18, makes no attempt to deny the well-established and broad split on whether a statute-of-limitations defense not raised at or before trial is irredeemably waived or merely forfeited with

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[1] Should this Court reverse the Fifth Circuit's restrictions on the law-of-the-case doctrine, this Court would have the option to address a further circuit split on the substance of the "exceeds authorized access" element of the crime alleged in this case. Pet. 8-9, 20-21 n. 5. That potential opportunity to address an additional split makes this case an unusually efficient vehicle for this Court to accomplish considerable legal housekeeping with a single grant.

the opportunity for plain-error review on appeal. Although it briefly suggests that this Court has previously denied certiorari on this split, the government well knows that past denials are largely irrelevant. This Court often denies cases in a developing split in order to allow the issue to percolate or simply because other splits were more pressing at the time. That it may have done so on this issue in the past is no reason to do so again here. Indeed, any percolation has now been amply accomplished and there is no further insight coming from cases that merely cite controlling circuit precedent and move on, as the court below did in this case.

Furthermore, there do not appear to be a host of more pressing splits clamoring for this Court's attention and, indeed, the Court's calendar at present seems to have ample room to address this longstanding, fully developed, yet straightforward split. That it can do so along with at least one and possibly two other splits makes this an exceptionally efficient vehicle and gives this Court a high "return" on its investment of time and energy.

The only other argument of any note by the government on this second question presented is the posturing claim, at 17-18, that it would win on remand even under the alternative standard of review and hence the case is a poor vehicle. Both aspects of that reasoning are flawed.

First, despite the government's purported confidence in its chances on remand, it failed to convince the Fifth Circuit on the merits and instead only obtained a decision applying the waiver rationale. Pet. App. A8-A9. Were the government's position as obvi-

ous as it claims, the court below certainly could have ruled in the alternative using a belt-and-suspenders approach. That it did not do so suggests that the merits of the underlying limitations question would have taken more work to resolve than the government suggests.

Second, the eventual prospects of this case on remand should be of little concern in this Court. The substantive limitations issue was not addressed at all by the court below, only the waiver question. As a vehicle, this case thus is perfect to address the question of waiver without the complication of also having to look to the underlying merits of the limitations issue and potentially moot the question presented. Whatever happens on remand simply has nothing to do with the question presented to *this* Court and hence nothing to do with whether this case is a favorable vehicle for considering that question.

Given that the government offers essentially no reason to deny certiorari, this Court should take the opportunity to resolve this well-developed split. That this Court could resolve two or potentially three splits concurrently makes this case an even more attractive vehicle and an efficient use of the Court's resources.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: June 2, 2015

No. 14-1095

In The
Supreme Court of the United States

MICHAEL MUSACCHIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed Mar. 9, 2015
Certiorari Granted June 29, 2015

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District Court for the Northern District of Texas, Sentencing Transcript Excerpt, July 3, 2013 ..... D1-D2

DISTRICT COURT DOCKET ENTRIES

U.S. District Court
Northern District of Texas (Dallas)
CRIMINAL DOCKET FOR CASE #:
3:10-cr-00308-P All Defendants

Case title: USA v. Musacchio et al

Date Filed: 11/02/2010
Date Terminated: 11/19/2013

Assigned to: Judge Jorge A Solis

Appeals court case number: 13-11294

* * * * *

Date Filed	#	Docket Text
		* * *
11/02/2010	1	INDICTMENT as to Michael Musacchio (1) count(s) 1, 23-24. Joseph Taylor (Roy) Brown (2) count(s) 1, 2-22, John Michael Kelly (3) count(s) 1, 2-22. (ykp) (Entered: 11/03/2010)
		* * *
11/04/2010	6	Minute Entry for proceedings held before Magistrate Judge Renee Harris Toliver: Arraignment as to Michael Musacchio (1) Count 1,23-24 held on 11/4/2010. Plea entered by Michael

Musacchio: Not Guilty on counts 1,23,24. Attorney Appearances: AUSA Linda Groves; Defense - Jay Ethington. (Court Reporter: Digital File) (No exhibits) Time in Court :01. (mcr) (Entered: 11/05/2010)

* * *

11/04/2010 10 Minute Entry for proceedings held before Magistrate Judge Renee Harris Toliver: Arraignment as to Joseph Taylor (Roy) Brown (2) Count 1,2-22 held on 11/4/2010. Plea entered by Joseph Taylor (Roy) Brown: Not Guilty on counts 1,2-22. Attorney Appearances: AUSA - Linda Groves; Defense David Finn. (Court Reporter: Digital File) (No exhibits) Time in Court :01. (mcr) (Entered: 11/05/2010)

* * *

11/05/2010 15 Minute Entry for proceedings held before Magistrate Judge Renee Harris Toliver: Arraignment as to John Michael Kelly (3) Count 1,2-22 held on 11/5/2010. Plea entered by John Michael Kelly: Not Guilty on counts 1,2-22. Attorney Appearances: AUSA - Paul Yanowitch; Defense John Nicholson. (Court Reporter: Digital File) (No exhibits) Time in Court :01. (mfw) (Entered: 11/08/2010)

* * *

11/17/2010	25	Unopposed MOTION for Designation as Complex Case and for Continuance filed by USA as to Michael Musacchio, Joseph Taylor (Roy) Brown, John Michael Kelly (Groves-DOJ, Linda) Modified on 11/18/2010 (skt). (Entered: 11/17/2010)
11/19/2010	26	ORDER granting 25 Unopposed Motion for Designation as Complex Case and for Continuance as to Michael Musacchio (1), Joseph Taylor (Roy) Brown (2), John Michael Kelly (3). Jury Trial continued to 7/18/2011 08:45 AM before Judge Jorge A Solis. Motions due by 6/8/2011. Pretrial Materials due by 7/1/2011. Responses due by 6/20/2011. Pretrial Conference set for 7/6/2011 03:00 PM before Judge Jorge A Solis. (see order) (Ordered by Judge Jorge A Solis on 11/19/2010) (axm) (Entered: 11/19/2010)
12/20/2010	27	Unopposed MOTION to Amend/Correct 1 Indictment filed by USA as to Michael Musacchio, Joseph Taylor (Roy) Brown, John Michael Kelly (Attachments: # 1 Proposed Amendment Amended Indictment) (Groves-DOJ, Linda) (Entered: 12/20/2010)
12/21/2010	28	ORDER granting 27 Government's Motion Requesting the Court to Permit the Filing of an Amended Indict-

	ment to Correct the Name of Defendant No. 2 to "Joseph Roy Brown" as to Michael Musacchio (1), Joseph Taylor (Roy) Brown (2), John Michael Kelly (3). (See Order) (Ordered by Judge Jorge A Solis on 12/21/2010) (skt) (Entered: 12/21/2010)
04/25/2011	NOTICE OF HEARING as to Joseph Roy Brown: Rearraignment set for 5/18/2011 01:30 PM in US Courthouse, Courtroom 1632, 1100 Commerce St., Dallas, TX 75242-1310 before Judge Jorge A Solis. (chmb) (Entered: 04/25/2011)
05/18/2011	ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Rearraignment Hearing as to Joseph Roy Brown held on 5/18/2011. Plea entered by Joseph Roy Brown (2) Guilty Count 1 Amended Indictment filed 12/21/2010. Defendant continued on Pretrial Release. Attorney Appearances: AUSA - Linda C. Groves; Defense - David Finn. (Court Reporter: Shawn McRoberts) (No exhibits) Time in Court - :15. (chmb) (Entered: 05/18/2011)
	* * *
08/02/2012	ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Rearraignment Hearing as to John Michael Kelly held on 8/2/2012.

		Plea entered by John Michael Kelly (3) Guilty Count 1. Pretrial Release continued. Attorney Appearances: AUSA - Linda Groves; Defense - John Nicholson. (Court Reporter: Shawn McRoberts) (No exhibits) Time in Court - :15. (chmb) (Entered: 08/02/2012)
		* * *
09/06/ 2012	128	SUPERSEDING INDICTMENT as to Michael Musacchio (1) count(s) 1s, 2s-3s. (axm) (Entered: 09/07/2012)
		* * *
09/07/ 2012	131	Proposed Jury Instructions filed by USA as to Michael Musacchio (Groves-DOJ, Linda) (Entered: 09/07/2012)
		* * *
09/07/ 2012	134	Proposed Jury Instructions filed by Michael Musacchio (Ethington, Jay) (Entered: 09/07/2012)
		* * *
01/08/ 2013	145	SECOND SUPERSEDING INDICTMENT as to Michael Musacchio (1) count(s) 1ss, 2ss-3ss. (jrr) (Entered: 01/09/2013)
		* * *
02/01/ 2013	152	Proposed Amended Jury Instructions filed by USA as to Michael Musacchio

(Groves-DOJ, Linda) Modified on 2/4/2013 (jgf). (Entered: 02/01/2013)

* * *

02/01/2013	154	Proposed Additional Jury Instructions filed by Michael Musacchio (Ethington, Jay) Modified on 2/4/2013 (jgf). (Entered: 02/01/2013)

* * *

02/19/2013	161	*** Jury Roll as to Michael Musacchio. (axm) (Entered: 02/19/2013)
02/19/2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Jury Selection held and Jury trial begun on as to Michael Musacchio held on 2/19/2013. Attorney Appearances: AUSA Linda Groves; Richard Green; Candina Heath; Defense Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted - returned to party) Time in Court 5:30. (chmb) (Entered: 02/20/2013)
02/20/2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Second day of Jury Trial as to Michael Musacchio held on 2/20/2013. Attorney Appearances: AUSA Linda Groves; Richard Green; Candina Heath; Defense Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted re-

		turned to party) Time in Court - 6:10. (chmb) (Entered: 02/21/2013)
02/21/ 2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Third day of Jury Trial as to Michael Musacchio held on 2/21/2013. Attorney Appearances: AUSA - Linda Groves: Richard Green; Candina Heath; Defense Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted returned to party) Time in Court 6:45. (chmb) (Entered: 02/22/2013)
02/22/ 2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Fourth day of Jury Trial as to Michael Musacchio held on 2/22/2013. Attorney Appearances: AUSA Linda Groves; Richard Green; Candina Heath; Defense - Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted - returned to party) Time in Court 6:45. (chmb) (Entered: 02/27/2013)
02/24/ 2013	162	Defendant's Second Amended Proposed Jury Instructions filed by Michael Musacchio (Ethington, Jay) (Entered: 02/24/2013)
02/25/ 2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Fifth day of Jury Trial as to Michael Musacchio held on 2/25/2013.

		Attorney Appearances: AUSA Linda Groves; Richard Green; Candina Heath; Defense Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (No exhibits) Time in Court - 3:15. (chmb) (Entered: 02/27/2013)
02/26/ 2013	163	Proposed Jury Instructions filed by USA as to Michael Musacchio (Groves-DOJ, Linda) (Entered: 02/26/2013)
02/26/ 2013	164	MOTION for Acquittal *Pursuant to Fed. R. Crim. P. 29* filed by Michael Musacchio with Brief/Memorandum in Support. (Ethington, Jay) (Entered: 02/26/2013)
02/26/ 2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Sixth day of Jury Trial as to Michael Musacchio held on 2/26/2013. Attorney Appearances: AUSA Linda Groves; Richard Green; Candina Heath; Defense - Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted returned to party) Time in Court 7:15. (chmb) (Entered: 02/27/2013)
02/27/ 2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Seventh Day of Jury Trial as to Michael Musacchio held on 2/27/2013. Jury Charge Conference held 5:15 p.m to 5:45 p.m. Attorney Appearances:

		AUSA - Linda Groves; Richard Green; Candina Heath; Defense Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted returned to party) Time in Court - 6:30. (chmb) (Entered: 02/28/2013)
		* * *
02/28/2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Eighth Day of Jury Trial as to Michael Musacchio held on 2/28/2013. Evidence concluded. Closing Arguments and Jury Charge. Case submitted to the jury for deliberation. Attorney Appearances: AUSA - Linda Groves, Richard Green, Candina Heath; Defense Jay Ethington, Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted returned to party) Time in Court 4:45. (chmb) (Entered: 03/01/2013)
02/28/2013	167	Certification of Trial Exhibits for Jury Deliberations filed by USA and Michael Musacchio as to Michael Musacchio. (Ordered by Judge Jorge A Solis on 2/28/2013) (chmb) (Entered: 03/04/2013)
03/01/2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Ninth Day of Jury Trial as to Michael Musacchio held on 3/1/2013.

		Jury continued deliberations. Jury Verdict Rendered Guilty on Counts 1, 2 and 3. Defendant continued on Pretrial Release. Attorney Appearances: AUSA Linda Groves, Richard Green, Candina Heath; Defense Jay Ethington, Reed Manning. (Court Reporter: Shawn McRoberts) (No exhibits) Time in Court 5:00. (chmb) (Entered: 03/04/2013)
03/01/ 2013	166	Jury Charge and Verdict Form as to Michael Musacchio. Jury Charge Signed by Judge Jorge A Solis on 2/28/2013. (chmb) (Entered: 03/04/2013)
03/01/ 2013	168	ORDER as to Michael Musacchio releasing all trial exhibits to counsel for the parties. (Ordered by Judge Jorge A Solis on 3/1/2013) (chmb) (Entered: 03/04/2013)
		* * *
03/15/ 2013	170	MOTION New Trial filed by Michael Musacchio (Attachments: # 1 Exhibit(s) Exhibit A, # 2 Exhibit(s) Exhibit B) (Ethington, Jay) (Entered: 03/15/2013)
		* * *
03/25/ 2013	173	RESPONSE by USA as to Michael Musacchio re: 170 MOTION New Trial (Groves-DOJ, Linda) (Entered: 03/25/2013)

* * *

08/29/2013	199	Supplemental MOTION for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29 filed by Michael Musacchio. (Ethington, Jay) Modified on 8/30/2013 (skt). (Entered: 08/29/2013)
08/29/2013	200	Courtesy copy of correspondence re Sentencing Hearing Response as to Michael Musacchio (Attachments: # 1 Additional Page(s) Attachment, # 2 Additional Page(s) Attachment) (Ethington, Jay) Modified on 8/30/2013 (skt). (Entered: 08/29/2013)
08/30/2013	201	NOTICE *Letter to Court* as to Michael Musacchio (Ethington, Jay) (Entered: 08/30/2013)
08/30/2013	203	RESPONSE AND OBJECTION by USA as to Michael Musacchio re: 199 Supplemental MOTION for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29 (Groves-DOJ, Linda) (Entered: 08/30/2013)

* * *

09/05/2013	206	ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Sentencing held on 9/5/2013 for Michael Musacchio (1) BOP for a term of Sixty (60) Months as to Counts 1 and 2 to run concurrent; Three (3)

Months as to Count 3 to run consecutive to Counts 1 and 2 for a total of Sixty-three (63) Months; Supervised Release for Three (3) years as to each Count to run concurrent for a total of Three (3) years. Restitution to be determined; MSA $100 per count for a total of $300.00. Defendant continued on Pretrial Release Voluntary Surrender date to be determined. Remaining issue of restitution to be briefed by counsel, briefs due 10/4/2013. Attorney Appearances: AUSA Linda Groves, Candina Heath; Defense Jay Ethington, Reed Manning: Camille Knight. (Court Reporter: Shawn McRoberts) (Exhibits admitted) Time in Court - 4:30. (chmb) Modified on 12/5/2013 to correct the file date (svc). (Entered: 09/06/2013)

09/25/2013	208	ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Sentencing held on 9/25/2013 for Joseph Roy Brown (2), Count 1, BOP for a term of Twelve (12) Months and One (1) day; Supervised Release Two (2) years; Restitution to be Determined; MSA $100.00. Remaining counts dismissed. Voluntary Surrender Date December 4, 2013 before 2:00 p.m. Attorney Appearances: AUSA Linda Groves; Defense David M. Finn. (Court Reporter: Shawn McRoberts) (No exhibits) Time in

		Court :20. (chmb) (Entered: 09/25/2013)
09/25/2013	209	ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Sentencing held on 9/25/2013 for John Michael Kelly (3), Count 1, Defendant placed on Probation for One (1) year; Restitution to be determined: MSA $100.00. Remaining counts dismissed. Attorney Appearances: AUSA Linda Groves; Defense - John M. Nicholson. (Court Reporter: Shawn McRoberts) (No exhibits) Time in Court - :10. (chmb) (Entered: 09/25/2013)
09/26/2013	210	JUDGMENT as to Joseph Roy Brown (2): Count 1, BOP for a term of Twelve (12) Months and One (1) day: Supervised Release Two (2) years; Restitution to be Determined; MSA $100. Counts 2-22, Dismissed on government's motion. (Ordered by Judge Jorge A Solis on 9/26/2013) (axm) (Entered: 09/26/2013)
09/26/2013	212	JUDGMENT as to John Michael Kelly (3): Count 1, Defendant placed on Probation for One (1) year; Restitution to be determined; MSA $100. Counts 2-22, Dismissed on government's motion. (Ordered by Judge Jorge A Solis on 9/26/2013) (axm) (Entered: 09/26/2013)

* * *

10/09/2013	216	MOTION for Release Pending Appeal filed by Michael Musacchio (Attachments: # 1 Proposed Order) (Ethington, Jay) (Entered: 10/09/2013)

* * *

11/19/2013	220	ELECTRONIC ORDER granting 216 Motion for Release Pending Appeal as to Michael Musacchio (1). All previous conditions of release are continued. (Ordered by Judge Jorge A Solis on 11/19/2013) (chmb) (Entered: 11/19/2013)
11/19/2013	221	Supplemental MOTION for Acquittal *Second Supplement to the Motion for Acquittal* filed by Michael Musacchio (Ethington, Jay) (Entered: 11/19/2013)
11/19/2013	222	JUDGMENT as to Michael Musacchio (1), Count(s) 1, 1s, 2s-3s, DISMISSED per JS chambers; Count(s) 1ss, BOP for a term of Sixty (60) Months as to Count 1; Supervised Release for Three (3) years as to Count 1; Restitution to be Determined; MSA $100.00; Count(s) 2ss-3ss, BOP for a term of Sixty Months as to Count 2 to run concurrent to Count 1; 3 Months as to Count 3 to run consecutive to Counts 1 and 2; Supervised Release Three years as to each Counts to run concurrent;

		Restitution to be determined; MSA $100 per count. Pursuant to LR 79.2 and LCrR 55.2, exhibits may be claimed during the 60-day period following final disposition (to do so, follow the procedures found atwww.txnd.uscourts.gov/Court Records). The clerk will discard exhibits that remain unclaimed after the 60-day period without additional notice. (Clerk to notice any party not electronically noticed.) (Ordered by Judge Jorge A Solis on 11/19/2013) (ykp) (Entered: 11/20/2013)
11/26/2013	224	NOTICE OF APPEAL to the Fifth Circuit as to 222 Judgment by Michael Musacchio. Filing fee $455, receipt number 70759. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. (twd) (Entered: 11/26/2013)
11/27/2013		Confirmation of receipt of payment from Kendall Law Group LLP in the amount of $455.00. Transaction posted on 11/26/2013. Receipt number DS070759 processed by yp. (ali) Lifted restriction on 11/27/2013 (ali). (Entered: 11/27/2013)
12/02/2013	225	RESPONSE AND OBJECTION by USA as to Michael Musacchio

		re: 199 Supplemental MOTION for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29, 221 Supplemental MOTION for Acquittal *Second Supplement to the Motion for Acquittal*(Attachments: # 1 Exhibit(s) Transcript of 1st Sent. Hrg.) (Groves-DOJ, Linda) (Entered: 12/02/2013)
12/03/ 2013		USCA Case Number as to Michael Musacchio 13-11294 for 224 Notice of Appeal, filed by Michael Musacchio. (svc) (Entered: 12/03/2013)
12/03/ 2013	226	NOTICE OF ATTORNEY APPEARANCE by Elizabeth Hosea Lemoine appearing for Michael Musacchio (Filer confirms contact info in ECF is current.) (Lemoine, Elizabeth) (Entered: 12/03/2013)
12/04/ 2013	227	Transcript Order Form: re 224 Notice of Appeal, transcript requested for Jury TrialSentencing held on 2/19/2013-2/22/2013, 2/25/2013-2/28/2013, 3/1/2013, 7/3/2013, 9/5/2013 before Judge Solis. (Lemoine, Elizabeth) (Entered: 12/04/2013)
01/03/ 2014	228	Notice of Filing of Official Electronic Transcript of Motion to Quash Proceedings as to Michael Musacchio held on 08/14/2012 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number

		(214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	229	Notice of Filing of Official Electronic Transcript of Motion to Suppres/Motion in Limine Proceedings as to Michael Musacchio held on 08/15/2012 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	230	Notice of Filing of Official Electronic Transcript of Trial Volume 1 of 8 Proceedings as to Michael Musacchio held on 02/19/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	231	Notice of Filing of Official Electronic Transcript of Trial Volume 2 of 8 Proceedings as to Michael Musacchio held on 02/20/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	232	Notice of Filing of Official Electronic Transcript of Trial Volume 3 of 8 Proceedings as to Michael Musacchio held on 02/21/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber

Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)

01/03/2014	233	Notice of Filing of Official Electronic Transcript of Trial Volume 4 of 8 Proceedings as to Michael Musacchio held on 02/22/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	234	Notice of Filing of Official Electronic Transcript of Trial Volume 5 of 8 Proceedings as to Michael Musacchio held on 02/25/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	235	Notice of Filing of Official Electronic Transcript of Volume 6 of 8 Proceedings as to Michael Musacchio held on 02/26/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	236	Notice of Filing of Official Electronic Transcript of Trial Volume 7 of 8 Proceedings as to Michael Musacchio held on 02/27/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber

		Shawn McRoberts. Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	237	Notice of Filing of Official Electronic Transcript of Trial Volume 8 of 8 Proceedings as to Michael Musacchio held on 02/28/2013, 03/01/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts. Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	238	Notice of Filing of Official Electronic Transcript of Sentencing Part 1 Proceedings as to Michael Musacchio held on 07/03/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts. Telephone number (214) 753-2349. * * * (smm) Modified on 1/3/2014 (aaa). (Entered: 01/03/2014)
01/03/2014	239	Notice of Filing of Official Electronic Transcript of Sentencing Part 2 Proceedings as to Michael Musacchio held on 09/05/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts. Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/15/2014	240	Transcript Redaction Request in case as to Michael Musacchio re: 232 , 233 , 234 Transcript filed by attorney Linda C Groves-DOJ

(Groves-DOJ, Linda) (Entered: 01/15/2014)

01/16/2014 241 Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 232 Notice of Filing of Official Electronic Transcript of Trial Volume 3 of 8 Proceedings as to Michael Musacchio held on 02/21/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/16/2014)

01/16/2014 242 Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 233 Notice of Filing of Official Electronic Transcript of Trial Volume 4 of 8 Proceedings as to Michael Musacchio held on 02/22/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/16/2014)

01/16/2014 243 Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 234 Notice of Filing of Official Electronic Transcript of Trial Volume 5 of 8 Proceedings as to Michael Musacchio held on 02/25/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts,

Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/16/2014)

* * *

01/29/2014	251	Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 231 Notice of Filing of Official Electronic Transcript of Trial Volume 2 of 8 Proceedings as to Michael Musacchio held on 02/20/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/29/2014)
01/29/2014	252	Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 232 Notice of Filing of Official Electronic Transcript of Trial Volume 3 of 8 Proceedings as to Michael Musacchio held on 02/21/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts. Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/29/2014)
01/29/2014	253	Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 233 Notice of Filing of Official Electronic Transcript of Trial Volume 4 of 8 Proceedings as to Michael Musacchio held on 02/22/2013

		before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/29/2014)
01/29/2014	254	Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 236 Notice of Filing of Official Electronic Transcript of Trial Volume 7 of 8 Proceedings as to Michael Musacchio held on 02/27/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/29/2014)
01/29/2014	255	Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 239 Notice of Filing of Official Electronic Transcript of Sentencing Part 2 Proceedings as to Michael Musacchio held on 09/05/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/29/2014)
02/04/2014		Record on Appeal for USCA5 13-11294 (related to 224 appeal) as to Michael Musacchio: Record consisting of: ECF electronic record, 15 Volume(s) electronic transcript, original exhibits, 1

		envelope(s) PSR/SOR, Sealed or ex parte document number(s): 52,59112,118,120,122,161,190,198,202 ,204,214 (circuit approval is required for access), certified to USCA. To request a copy of the record (on disk or on paper), contact the appeals deputy in advance to arrange delivery. (svc) (Entered: 02/04/2014)
02/06/ 2014		Record on Appeal for USCA5 13-11294 (related to 224 appeal) as to Michael Musacchio: transmitted to US Attorney's Office on disk only by hand delivery (svc) (Entered: 02/06/2014)
02/06/ 2014		Record on Appeal for USCA5 13-11294 (related to 224 appeal) as to Michael Musacchio: transmitted to Kendall Law Group on disk only by hand delivery (svc) (Entered: 02/06/2014)
03/20/ 2014	257	Receipt for Return of Passport to US Department of State as to Michael Musacchio. Passport Number 439908295 issued by USA. (ctf) (Entered: 03/21/2014)
09/04/ 2014	258	TRIAL EXHIBITS by Michael Musacchio (svc) (Entered: 09/04/2014)
09/04/ 2014	259	EXHIBITS as to Michael Musacchio (svc) (Entered: 09/04/2014)
09/04/ 2014		Supplemental Record on Appeal for USCA5 13-11294 (related to 224 appeal) as to Michael

		Musacchio: Record consisting of: 1 ECF electronic record, certified to USCA. To request a copy of the record (on disk or on paper), contact the appeals deputy in advance to arrange delivery. (svc) (Entered: 09/04/2014)
09/05/ 2014		Supplemental Record on Appeal for USCA5 13-11294 (related to 224 appeal) as to Michael Musacchio: transmitted to US Attorney's Office (svc) (Entered: 09/05/2014)
11/26/ 2014		Return of Exhibits to US Attorney's Office. No exhibits remain in clerk custody. (EXH-ADM flag removed) Exhibits offered by USA as to Michael Musacchio. (svc) (Entered: 11/26/2014)
12/18/ 2014	260	Opinion of USCA in accordance with USCA judgment re 224 Notice of Appeal, filed by Michael Musacchio. (svc) (Entered: 12/18/2014)
12/18/ 2014	261	JUDGMENT/MANDATE of USCA as to 224 Notice of Appeal, filed by Michael Musacchio. The judgment of the District Court is affirmed (Attachments: # 1 USCA5 Letter) (svc) (Entered: 12/18/2014)
01/05/ 2015	262	ORDER as to Michael Musacchio: On this day, the Court considered the need to enter the following order. The above Defendant shall surrender to the Bureau of Prisons on Wednesday,

		2/11/2015 before 2:00p.m. It is therefore ORDERED that Defendant Michael Musacchio surrender to the Bureau of Prisons on 2/11/2015 before 2:00p.m. (Ordered by Chief Judge Jorge A Solis on 1/5/2015) (bdb) (Entered: 01/06/2015)
		* * *
07/02/2015	267	Received letter from USCA5: The petition for a writ of certiorari is granted. (axm) (Entered: 07/02/2015)

COURT OF APPEALS DOCKET ENTRIES

General Docket
United States Court of Appeals
for the 5th Circuit

Court of Appeals
Docket #: 13-11294

USA v Michael Musacchio

Appeal From: Northern District of Texas, Dallas

Fee Status: Fee Paid

Docketed: 11/27/2013
Termed: 11/10/2014

* * * * *

11/27/2013	2 pg, 93.56 KB	DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. Michael Musacchio [13-11294] (MVM)
12/04/2013		APPEARANCE FORM FILED by Attorney(s) Elizabeth Hosea Lemoine for party(s) Appellant Michael Musacchio, in case 13-11294 [13-11294] (NFD)

12/04/2013	APPEARANCE FORM FILED by Attorney(s) Elton Joe Kendall for party(s) Appellant Michael Musacchio, in case 13-11294 [13-11294] (NFD)
	* * *
12/17/2013	APPEARANCE FORM FILED by Attorney Jody Lynn Rudman for Appellant Michael Musacchio in 13-11294 [13-11294] (NFD)
01/06/2014	TRANSCRIPT FILED IN DISTRICT COURT Transcript Order: Court Reporter: Shawn McRoberts, Dt. Filed in Dist. Ct: 01/03/2014 Ct. Reporter Acknowledgment deadline canceled. Electronic ROA due on 01/21/2014. [13-11294] (MBC)
02/05/2014	ELECTRONIC RECORD ON APPEAL FILED. Exhibits on File in District Court? Yes (Trial Exhibits with Counsel). Electronic ROA deadline satisfied. [13-11294] (LBM)

02/05/2014	4 pg, 77.84 KB	BRIEFING NOTICE ISSUED A/Pet's Brief Due on 03/17/2014 for Appellant Michael Musacchio. [13-11294] (LBM)
02/05/2014		PHONE EXTENSION CONFIRMED for Appellant Mr. Michael Musacchio. Extension granted to and including 04/16/2014. A/Pet's Brief deadline updated to 04/16/2014 for Appellant Michael Musacchio [13-11294] (LBM)
02/05/2014	1 pg, 98.91 KB	LETTER filed by Appellant Mr. Michael Musacchio confirming 30 day extension of briefing deadline. Date of Service: 02/05/2014 via email - Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] REVIEWED AND/OR EDITED. LETTER filed [13-11294] (Elizabeth Hosea Lemoine)
02/10/2014		ATTORNEY NOT PARTICIPATING. H. Jay Ethington is designated as inactive in this case. Reason:Not attorney in the case, and incorrect law firm added. [13-11294] (MFY)

03/21/2014	5 pg, 39.13 KB	UNOPPOSED MOTION filed by Appellant Mr. Michael Musacchio to extend time to file brief as appellant until 05/16/2014 at 05:00 pm [7592597-2]. Date of service: 03/21/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] (Elton Joe Kendall)
03/24/2014	1 pg, 52.12 KB	CLERK ORDER granting in part motion to extend time to file appellant's brief filed by Appellant Mr. Michael Musacchio [7592597-2] A/Pet's Brief deadline updated to 05/01/2014 for Appellant Michael Musacchio. [13-11294] (MFY)

05/01/ 2014	71 pg, 228.98 KB	APPELLANT'S BRIEF FILED by Mr. Michael Musacchio. Date of service: 05/01/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] REVIEWED AND/OR EDITED. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Appellee's Brief due on 06/03/2014 for Appellee United States of America. Paper Copies of Brief due on 05/12/2014 for Appellant Michael Musacchio. [13-11294] (Jody Lynn Rudman)
05/01/ 2014	212 pg, 9.16 MB	RECORD EXCERPTS FILED by Appellant Mr. Michael Musacchio. Date of service: 05/01/2014 via email - Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] REVIEWED AND/OR EDITED. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 05/12/2014 for Appellant Michael Musacchio. [13-11294] (Jody Lynn Rudman)

05/01/ 2014	147 pg, 1.94 MB	ADDENDUM FILED by Appellant Mr. Michael Musacchio Date of Service: 05/01/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] REVIEWED AND/OR EDITED. # of Copies Provided: 0 Paper Copies of Addendum due on 05/12/2014 for Appellant Michael Musacchio. [13-11294] (Jody Lynn Rudman)
05/01/ 2014	5 pg, 1.72 MB	LETTER filed by Appellant Mr. Michael Musacchio Letter advising Court of trial exhibits maintained by parties. Date of Service: 05/01/2014 via email Attorney for Appellants: Kendall. Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] [SEND TO SCREENING JUDGE AND PANEL] (Jody Lynn Rudman)
05/06/ 2014		APPEARANCE FORM FILED by Attorney(s) Brian W McKay for party(s) Appellee USA, in case 13-11294 [13-11294] (NFD)

05/12/ 2014	Paper copies of appellant brief filed by Appellant Mr. Michael Musacchio in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7 Paper Copies of Brief due deadline satisfied. [13-11294] (NFD)
05/12/ 2014	Paper copies of record excerpts filed by Appellant Mr. Michael Musacchio in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 4. Paper Copies of Record Excerpts due deadline satisfied. [13-11294] (NFD)
05/12/ 2014	Paper copies of addendum brief filed by Appellant Mr. Michael Musacchio in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7 Paper Copies of Addendum due deadline satisfied. [13-11294] (NFD)

05/30/ 2014		PHONE EXTENSION CONFIRMED for Appellee USA. Extension granted to and including 07/03/2014. E/Res's Brief deadline updated to 07/03/2014 for Appellee United States of America [13-11294] (MCS)
07/03/ 2014	3 pg, 53.31 KB	UNOPPOSED MOTION filed by Appellee USA to file brief in excess of the word count limitation but not to exceed 17,067 words [7673865-2]. Date of service: 07/03/2014 via email - Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: McKay [13-11294] (Brian W McKay)

07/03/ 2014	90 pg, 406.26 KB	APPELLEE'S BRIEF FILED by Appellee USA. Date of service: 07/03/2014 via email Attorney for Appellants: Kendall. Lemoine, Rudman; Attorney for Appellee: McKay [13-11294] REVIEWED AND/OR EDITED. APPELLEE'S BRIEF FILED # of Copies Provided: 0 E/Res's Brief deadline satisfied. Paper Copies of Brief due on 07/08/2014 for Appellee United States of America.. Reply Brief due on 07/21/2014 for Appellant Michael Musacchio [13-11294] (Brian W. McKay)
07/03/ 2014	1 pg, 59.99 KB	CLERK ORDER granting motion to file brief in excess of word count limitation but not to exceed 17,067 words filed by Appellee USA [7673865-2]. [13-11294] (NFD)
07/03/ 2014		PHONE EXTENSION CONFIRMED for Appellant Mr. Michael Musacchio. Extension granted to and including 07/28/2014. Reply Brief deadline updated to 07/28/2014 for Appellant Michael Musacchio [13-11294] (MVM)

07/08/ 2014		Paper copies of appellee brief filed by Appellee USA in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [13-11294] (NFD)
07/14/ 2014	4 pg, 36.57 KB	UNOPPOSED MOTION filed by Appellant Mr. Michael Musacchio to extend time to file reply brief until 08/11/2014 at 11:59 pm [7681566-2]. Date of service: 07/14/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix. McKay [13-11294] (Elton Joe Kendall)
07/15/ 2014	1 pg, 52.11 KB	CLERK ORDER granting in part motion to extend time to file reply brief filed by Appellant Mr. Michael Musacchio [7681566-2] Reply Brief deadline updated to 08/04/2014 for Appellant Michael Musacchio. [13-11294] (MFY)

07/30/2014	1 pg, 62.31 KB	CASE TENTATIVELY calendared for oral argument for the week of 10/06/2014. [13-11294] (GAM)
08/04/2014	3 pg, 26.1 KB	UNOPPOSED MOTION filed by Appellant Mr. Michael Musacchio to file brief in excess of the word count limitation but not to exceed 8810 words [7698028-2]. Date of service: 08/04/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay [13-11294] (Jody Lynn Rudman)

08/04/ 2014	47 pg, 115.02 KB	APPELLANT'S REPLY BRIEF FILED by Mr. Michael Musacchio Date of service: 08/04/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay [13-11294] REVIEWED AND/OR EDITED. Brief NOT Sufficient: Excess Word Count. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT # of Copies Provided: 0 Reply Brief deadline satisfied. Sufficient Brief due on 08/11/2014 for Appellant Michael Musacchio. [13-11294] (Elton Joe Kendall)
08/07/ 2014	2 pg, 96.2 KB	COURT ORDER appellant's unopposed motion to file reply brief in excess of the word limitation, but not to exceed 8,810 words is GRANTED. [7698028-2] Judge(s): PRO [13-11294] (NFD)

08/07/ 2014	1 pg, 60 KB	BRIEF MADE SUFFICIENT filed by Appellant Mr. Michael Musacchio in 13-11294 [7698037-2]. Additional number of copies provided: 0 Sufficient Brief deadline satisfied. Paper Copies of Brief due on 08/12/2014 for Appellant Michael Musacchio. [13-11294] (NFD)
08/12/ 2014		Paper copies of appellant reply brief filed by Appellant Mr. Michael Musacchio in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7 Paper Copies of Brief due deadline satisfied. [13-11294] (NFD)
08/20/ 2014		CASE CALENDARED for oral argument on Wednesday, 10/08/2014 in New Orleans in the West Courtroom -- AM session. In accordance with our policy, lead counsel only will receive via email at a later date a copy of the court's docket and an acknowledgment form. All other counsel of record should monitor the court's website for the posting of the oral argument calendars.. [13-11294] (PFT)

09/04/ 2014		SUPPLEMENTAL ELECTRONIC RECORD ON APPEAL FILED. PSI included? No. [13-11294] (MRB)
09/04/ 2014		Exhibits, 1 env (1 CD-All Trialand Sentencing Exhibits). FILED [13-11294] (NFD)
09/08/ 2014		Exhibits, 1 env. (CD of Trial and Sentencing Exhibits) , FILED [13-11294] (NFD)
09/10/ 2014	2 pg, 81.9 KB	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA Date of Service: 09/10/2014 via email Attorney for Appellants: Kendall, Rudman; Attorney for Appellee: McKay [13-11294] (Brian W McKay)
09/12/ 2014	2 pg, 80.3 KB	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA Date of Service: 09/12/2014 via email Attorney for Appellants: Kendall, Rudman; Attorney for Appellee: McKay [13-11294] (Brian W McKay)

09/15/2014	5 pg, 30.94 KB	OPPOSED MOTION filed by Appellant Mr. Michael Musacchio to strike 28j letter filed by Appellee USA in 13-11294 [7728600-2], 28j letter filed by Appellee USA in 13-11294 [7726661-2] [7730211-2] and INCORPORATED RESPONSE to the 28j letter filed by Appellee USA in 13-11294 [7728600-2], 28j letter filed by Appellee USA in 13-11294 [7726661-2] Date of service: 09/15/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay [13-11294] (Elton Joe Kendall)
09/16/2014		RESPONSE DUE to motion to strike 28j letters filed by Appellant Mr. Michael Musacchio in 13-11294 [7730211-2]Response/Opposition due on 09/29/2014 [13-11294] (MFY)

09/17/ 2014	2 pg, 100.45 KB	COURT ORDER denying appellant's opposed motion to strike the appellee's Rule 28(j) letters filed September 10 and 12, 2014. This ruling is not intended as a comment on the applicability of the authorities cited. The appellant is permitted, but not required, to respond to the objected-to submissions. [7730211-2] [13-11294] (MFY)
09/22/ 2014	2 pg, 61.25 KB	RESPONSE to RULE 28(j) filed by Mr. Michael Musacchio [7735990-1] to the 28j letter filed by Appellee USA in 13-11294 [7726661-2] Date of Service: 09/22/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay. [13-11294] REVIEWED AND/OR EDITED. to the 28j letter filed by Appellee USA in 13-11294 [7726661-2] [13-11294] (Jody Lynn Rudman)

10/01/2014	2 pg, 61.49 KB	RESPONSE filed by Appellant Mr. Michael Musacchio [7743880-1] to the 28j letter filed by Appellee USA in 13-11294 [7728600-2] Date of Service: 10/01/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay. [13-11294] REVIEWED AND/OR EDITED. RESPONSE filed by Appellant Mr. Michael Musacchio to the 28j letter filed by Appellee USA in 13-11294 [7728600-2] [13-11294] (Jody Lynn Rudman)
10/08/2014		ORAL ARGUMENT HEARD before Judges Smith, Barksdale, Haynes. Arguing Person Information Updated for: Elton Joe Kendall arguing for Appellant Michael Musacchio; Arguing Person Information Updated for: Brian W. McKay arguing for Appellee United States of America [13-11294] (PFT)

11/10/ 2014	16 pg, 191.43 KB	UNPUBLISHED OPINION FILED. [13-11294 Affirmed] Judge: JES , Judge: RHB Judge: CH. Mandate pull date is 12/01/2014 for Appellant Michael Musacchio [13-11294] (JRS)
11/10/ 2014	1 pg, 34.6 KB	JUDGMENT ENTERED AND FILED. [13-11294] (JRS)
11/21/ 2014	42 pg, 228.43 KB	PETITION filed by Appellant Mr. Michael Musacchio for rehearing en banc [7782976-2]. Date of Service: 11/21/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay [13-11294] (Elton Joe Kendall)
11/24/ 2014	1 pg, 59.76 KB	PAPER COPIES REQUESTED for the petition for rehearing en banc filed by Appellant Mr. Michael Musacchio in 13-11294 [7782976-2]. Mandate pull date canceled.. Paper Copies of Rehearing due on 12/01/2014 for Appellant Michael Musacchio. [13-11294] (NFD)

11/26/ 2014		Paper copies of petition for rehearing en banc filed by Appellant Mr. Michael Musacchio in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 0. Paper Copies of Rehearing due deadline satisfied. [13-11294] (NFD)
12/09/ 2014	3 pg, 116.97 KB	COURT ORDER denying petition for rehearing en banc filed by Appellant Mr. Michael Musacchio [7782976-2] Without Poll. Mandate pull date is 12/16/2014 [13-11294] (NFD)
12/15/ 2014	39 pg, 2.21 MB	OPPOSED MOTION filed by Appellant Mr. Michael Musacchio to stay issuance of the mandate for 90 days, or until March 17, 2015. [7798968-2]. Date of service: 12/15/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay [13-11294] (Elton Joe Kendall)

12/16/ 2014	2 pg, 104.07 KB	COURT ORDER- The appellant's opposed motion for stay of the mandate pending the filing of a petition for writ of certiorari is DENIED. [7798968-2] Judge(s): JES. [13-11294] (NFD)
12/17/ 2014	16 pg, 282.17 KB	MANDATE ISSUED. Mandate pull date satisfied. [13-11294] (NFD)
03/13/ 2015	1 pg, 55.03 KB	SUPREME COURT NOTICE that petition for writ of certiorari [7863703-2] was filed by Appellant Mr. Michael Musacchio on 03/09/2015. Supreme Court Number: 14-1095. [13-11294] (LGL)
06/30/ 2015	3 pg, 170.53 KB	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Michael Musacchio in 13-11294 on 06/29/2015. [7949895-1] [13-11294] (CAV)

ORIGINAL INDICTMENT, NOV 2, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
V	§	NO.
	§	[3 10-CR-00308-P]
	§	
MICHAEL MUSACCHIO (1)	§	
JOSEPH TAYLOR	§	
(ROY) BROWN (2)	§	
JOHN MICHAEL KELLY (3)	§	
	§	

INDICTMENT

The Grand Jury Charges:

Introduction

At all times material to this indictment:

1. Exel Transportation Services, Inc. (Exel), formerly known as Mark VII Transportation Co., Inc. (Mark VII), had offices in Addison and Dallas, Texas, Memphis, Tennessee and elsewhere, and conducted business in the Northern District of Texas, Dallas Division, and elsewhere.

2. Total Transportation Services LLC conducted business in the Northern District of Texas, Dallas Division, and elsewhere as Worldwide Total Transportation Services GP LLC and was the general partner of the entity operated as Total Transportation Services LP doing business as Worldwide Total Transportation Services LP Total Transportation Services LLC and Total Transportation Services LP operated as Total Transportation Services (TTS). TTS was formed on or about November 15, 2005.

3. TTS and Exel were competitors. Exel was a third party logistics company or intermodal marketing company which provided transportation and supply chain management products and services that facilitated the links between shippers and common carriers in the manufacturing, retail and consumer industries. Exel entered into contracts with independent agents and independent sales agents. Through these contractual arrangements and the utilization of in-house sales agents, Exel connected shipping customers with appropriate carriers and provided products, services and technology to assist its customers to transport goods. ITS, as Exel's competitor, was also a third party logistics company which offered similar types of business services and products, and utilized similar types of contracts with independent agents and independent sales agents.

4. Michael J. Musacchio, from in or about 1992, and continuing through on or about September 9, 2004, was employed by Exel and its predecessor Mark VII in high level supervisory, management and officer positions. From in or about 2000, through in or about September 9, 2004, Musacchio was the Presi-

dent and Chief Executive Officer of Exel Musacchio left his position with Exel on or about September 9, 2004. From in or about November 2005 through in or about April 2006, Musacchio was employed by TTS as the President and CEO. Musacchio was one of the initial Directors on the Board of Directors of TTS and held equity ownership in TTS.

5. Joseph Taylor Brown, also known as Roy Brown, worked for Exel and its predecessor Mark VII from in or about August 1999 until on or about October 17, 2005. At the time Brown left Exel, Brown's position was Vice President of Agency Support which was primarily an Information Technology position. Brown agreed to accept a position with TTS on or about October 21, 2005, as the Vice President for Information Technology. From in or about October 2005 through in or about April 2006, Brown was employed by ITS. Before Brown left TTS, he held an equity ownership interest in TTS.

6. John Michael Kelly worked for Exel from on or about October 2, 2000 until his resignation on or about October 27, 2005. At the time of his resignation, Kelly worked as the Senior Network Engineer for Exel. As an information technology specialist or network administrator, Kelly had administrator level access to all of the networked computers and internal email systems at Exel, including administrator-level access to Exel's computer network. After leaving Exel until on or about October 27, 2010, Kelly was employed as Manager IT-Infrastructure for TTS.

7 At all times relevant to this indictment, the email servers of Exel were located at the corporate offices of Exel in Memphis, Tennessee. In addition,

Musacchio, Brown and Kelly, while employed by Exel, worked at the Exel offices in Dallas, Texas and Addison, Texas. All Exel employees were bound by the Exel "Employment and Noncompete Agreement" and the "Exel Transportation Services, Inc. E-Mail and Telephonic Communications Employee Acknowledgment Form." 8. Unindicted coconspirators no. 1, 4, and 5 were employees of Exel who became employees of TTS after Musacchio and Brown left Exel. Unindicted coconspirators no. 2 and 3 were financiers.

Count One

Conspiracy To Make Unauthorized Access to Protected Computer and To Exceed Authorized Access to Protected Computer (Violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii) (unauthorized access and exceeding authorized access));

1. The Grand Jury realleges and incorporates the allegations of paragraphs 1-8 of the Introduction to the Indictment.

Object of the Conspiracy

2. From at least in or about April 2004 and continuing through in or about March 2006, in the Dallas Division of the Northern District of Texas and elsewhere, defendants Michael Musacchio, Joseph Taylor (Roy) Brown and John Michael Kelly, aided and abetted by each other, did unlawfully, willfully, and knowingly combine, conspire, confederate and agree among themselves, with each other and with other persons known and unknown to the Grand Jury, to commit offenses against the United States, specifically, to intentionally access a computer without authorization and exceed authorized access to a protected

computer, as defined at 18 U.S.C. § 1030(e)(2)(B), and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain and in furtherance of a criminal and tortious act in violation of the Constitution or laws of the United States or of any state, including the State of Texas, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii) (unauthorized access and exceeding authorized access to a protected computer)).

Manner and Means

A. Musacchio and Brown made unauthorized access and exceeded authorized access to Exel's protected computers including the Exel mail server from their personal internet accounts, their assigned user accounts at the offices of TTS, and the administrator accounts at Exel, and obtained Exel emails, email attachments, and other business documents containing Exel's confidential and proprietary information. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly, and the unindicted coconspirators.

B. Musacchio and Brown obtained administrative passwords and login information to Exel's protected computers from Kelly and made unauthorized access and exceeded any authorized access to Exel's protected computers. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly and the unindicted coconspirators.

C. Musacchio directed unindicted coconspirators, who were employed by Exel during the time of the conspiracy, to exceed any authorized access to Exel's

protected computers, and to obtain Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. He did so to provide a commercial advantage and private financial gain to himself, TIS, Brown, Kelly and the unindicted coconspirators.

D. Brown made unauthorized access to and exceeded his authorized access to Exel's protected computers and obtained Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. Brown frequently forwarded Exel's confidential, proprietary emails and documents to Musacchio and other unindicted coconspirators. He did so to provide a commercial advantage and private financial gain to himself, TTS, Musacchio, Kelly and the unindicted coconspirators.

E. Brown obtained administrative passwords and login infon'nation to Exel's protected computers from Kelly and provided the passwords and login information to Musacchio to enable him to make unauthorized access to the protected computers of Exel and to defraud Exel of its proprietary information and business documents for the benefit of Musacchio, Brown, Kelly, the unindicted coconspirators and TTS.

F. Kelly, while employed by Exel, instructed an Exel IT employee that he should not change the administrative passwords' on the Exel computer servers even after Kelly and Brown left Exel. The retention of the same administrative passwords provided continued unauthorized access to Exel's protected computers after Kelly, Brown, and Musacchio left Exel's em-

ployment and became employees of TTS, Exel's competitor.

G. Kelly provided the. Exel passwords and login information to Brown. Brown provided the Exel passwords and login information to Musacchio, to enable Brown, Kelly and Musacchio to make unauthorized access to the protected computers of Exel. He did so to provide a commercial advantage and private financial gain to Musacchio, Brown, Kelly, the unindicted coconspirators, and ITS.

Overt Acts

In furtherance of the conspiracy and to achieve its objects, defendants Michael Musacchio, Joseph Taylor (Roy) Brown, and John Michael Kelly committed and caused to be committed, among others, the following overt acts in the Northern District of Texas, and elsewhere:

2004-2005

1. In or about April 2004, Musacchio and unindicted coconspirators No.2 and 3, discussed the funding for the formation of a new company, later to be called TTS (the funding initiative was referred to as "Otra Vez"), which would compete with Exel in the transportation services industry. The participants agreed upon the initial management group of TTS, and entered into an agreement to obtain Exel's proprietary and confidential information for the benefit of TTS.

2. On or about September 7, 2004, Musacchio resigned from his position as president of Exel effective September 9, 2004. On or about September 7, 2004, Musacchio and Brown discussed how Musacchio

could access Exel's protected computers without authorization after Musacchio left Exel's employment.

3. On or about September 30, 2004, Musacchio sent an email with attachment to unindicted coconspirators No.2 and 3 from his personal comcast.net account with the message "here is the.ETS 2005 budget plan." The attachment was the budget plan which was dated after Musacchio had left Exel.

4. On or about December 21, 2004, Brown exceeded his authorized access to the Exel email server and to the email account of an Exel employee known to the grand jury. Brown used his Blackberry and forwarded an email he had obtained from the Exel employee's account to Musacchio at Musacchio's comcast.net account with the message: "Some email between Jim and Andrew ..... Maybe ETS is for sale?"

5. On or about January 7, 2005, Brown exceeded authorized access to the Exel email server and to the account of a person known to the grand jury. Brown used his bellsouth.net account to forward an email message from that account to Musacchio at his comcast.net account with the subject line "You will enjoy this....." Musacchio replied by email to Brown "This is great stuff! Thanks."

6. On or about February 21, 2005, an Exel employee known to the grand jury sent an email to Musacchio in which he asked Musacchio not to send items to his Exel email account due to the "covertness of this operation."

7 On or about April 22, 2005, Brown, while working at Exel, exceeded his authorized access and accessed the Exel email accounts for Exel employees. Brown obtained copies of email messages and at-

tachments containing Exel proprietary business plans which he forwarded to Musacchio at Musacchio's comcast.net account. Musacchio replied to Brown by return email and made the following request: "Roy, if you can keep watch for replies to this email or anything else related to it, that would be very helpful" Brown responded, "Doing my best."

8. On or about May 16, 2005, Musacchio and an independent agent met with other persons known to the grand jury to discuss a revised business plan for a new business entity which would compete with Exel.

9. On or about August 23, 2005, Brown and Musacchio exchanged emails in which Brown provided Musacchio with Exel's proprietary agency information which he had obtained from Exel's email accounts by exceeding his authorized access to Exel's servers. Musacchio emailed Brown that "this will be helpful," then requested Brown provide additional emails from the email account of Exel's president. Brown responded that it was possible for him to provide additional emails from that account and asked if there was specific information he should look for.

10. On or about August 30, 2005, Brown exceeded his authorized access for the email account of "Ets.Offices.All@Ets.Exel.Com" and forwarded an email message sent from "bill.reed@ets.exel.com" to his home email account with bellsouth.net. Brown then forwarded the message from his home account to Musacchio at Musacchio's comcast.net account.

11. On or about September 1, 2005, Brown emailed Exel's proprietary information to Musacchio concerning the possible future acquisition of Exel. Musacchio

responded to Brown that "this ... is going to fall right into our plan."

12. On or about September 20, 2005, Brown exceeded his authorized access to Exel's email server and to the account of the Exel president. He used his bellsouth.net account to send a copy of an email from the president's Exel account concerning the president's board presentation with an attached spreadsheet to Musacchio at Musacchio's comcast.net account. Musacchio replied to Brown "you are the Man!"

13. On or about September 20, 2005, Brown exceeded his authorized access to Exel's email server and to the email account of Exel's president, and obtained a file "Phantom Stock Option programme.xls." He then used his bellsouth.net account to send the file to Musacchio at Musacchio's comcast.net account. Musacchio replied by email: "You are on fire! Take a look at Toad's email and see if he is sucking up to Jim!"

Brown then responded: "he is about as much out of the loop as Steve. I have looked but to no great [findings [sic]."

14. Beginning on or about September 20, 2005 and continuing through March 25, 2006, a TTS user account assigned to Brown used the TTS servers to log onto the Exel servers. Brown exceeded his authorized access to Exel servers in this manner prior to leaving Exel on October 17, 2005, and acted without authorized access after that date. While logged on, the TTS account accessed the email accounts of Exel's president, vice president and other Exel employees more than 300 times.

15. On or about September 21, 2005, Brown exceeded his authorized access to the Exel email server and to the email account of the Exel president. He used his bellsouth.net account to forward an email from the Exel presid to another employee's account to Musacchio at Musacchio's comcast.net account with the subject line "From Jim to Andrew." On that date Brown also exceeded authorized.a9cess to the Exel email server, and used his bellsouth.net account to forward to Musacchio at Musacchio's comcast.net account an email with attachments concerning proposed corporate changes which was sent from the Exel president to "Andrew/Tony."

16. On or about October 10, 2005, Brown exceeded authorized access to the Exel email server. Brown sent an email from his bellsouth.net account to Musacchio at Musacchio's comcast.net account with the subject line: "Interesting reading ....."

17. On or about October 10, 2005, Brown exceeded his authorized access to the Exel email server and to the email account of Exel's president. Brown forwarded a copy of an email from the president's account to Musacchio. Musacchio replied to Brown, "This is great! ...as long as Exel has something else to focus on, it will keep us off of their radar screen! ... Isn't there a way (when the time is right for us to write and email as Brad to Jim and really make some bogus shit up for them to get excited about? [sic]" Brown responded "Yes and it sounds like fun ... that would really [expletive deleted] with their heads!" Musacchio then emailed to Brown "I would like to compose an email from Brad to Jim. Can we do it and

not have it traced?" On or about October 11, 2005, Brown responded "Yes, of course."

18. On or about October 14, 2005, Brown exceeded his authorized access to Exel's email server and to the email account of Exel's president. Brown used his bellsouth.net account and forwarded an email from the president's account to Musacchio at Musacchio's comcast.net account with the subject line: "RE: You will enjoy this ..... "Musacchio replied by email and wrote: "Thanks. Now the next question is, how are we going to get into email after you leave?" Brown replied: "Not a problem.....I have the back door password that only I know and no one else can change." Musacchio emailed back to Brown "beauty!"

19. On or about October 14, 2005, Musacchio emailed Brown from his comcast.net account with the subject line "Follow Up," and asked Brown to "Please keep looking in Brad's email to see if there id [sic] any information being passed to him from Frito-Lay about a meeting I will be having with them. Thanks."

20. On or about October 26, 2005, Brown sent Musacchio an email from Exel Legal Counsel to Exel's president that he obtained by an unauthorized access to Exel's email server: The email to Musacchio had the subject line "from Dick to Jim." On the same date, Musacchio forwarded the email to unindicted coconspirator no. 2.

21. On or about October 29, 2005, Musacchio emailed Brown and directed "When you are perusing Jim or Andrew's email, please look for monthly/weekly financials. Thanks." Brown replied by email "What month do you want? I have everything up until

I left which is through September. October numbers will be next week."

22. In or about October 2005, before Brown left Exel's employment, Kelly showed Brown how to access Exel's email system via the internet. Kelly showed Brown how to use an administrator-level account access Exel employees' individual email accounts.

23. On or about October 27, 2005, Musacchio forwarded an email to a person known to the, grand jury which had been obtained without authorization from Exel servers. The email which Musacchio forwarded was from Exel counsel to the Exel president concerning the fact that no Federal Maritime Commission Application existed for Musacchio.

24. On or about November 1, 2005, Brown made unauthorized access to the Exel email server and accessed the email account of the Exel president. He then used his bellsouth.net account to forward an email from the president's account to Musacchio at Musacchio's comcast.net account with the subject line: "How funny is this shit!"

25. On or about November 3, 2005, unindicted coconspirator no. 1 used her Hotmail account and sent an email to Musacchio containing information about phone calls she had overheard the company president making at Exel's office. Musacchio thanked her and told her "this is good stuff." Musacchio then used his comcast.net email account to email Brown with the subject line "FW: Edie, and other misc. gossip." In the email Musacchio wrote: "Confidential to you, but stay close to Jim's email. This is going to get interesting! Please do not let [unindicted coconspirator no. 1]

know that I passed this to you! Thanks." Brown responded from his bellsouth.net email account and stated " ... I will get back in the email and see what all is taking place."

26. On or about November 7, 2005, Brown made unauthorized access to the Exel email server and accessed the email account of the Exel president. He then used his bellsouth.net account to forward an email in the president's account to Musacchio at Musacchio's comcast.net account with the the subject line: "From Jim to Dan/Andrew/Tony." Musacchio then sent the email to unindicted coconspirator no. 1 with the message, "You didn't see this. ok."

27 On or about November 8, 2005, Brown made an unauthorized access to Exel's email server and the account of Exel's president and copied an email from the account. Brown then emailed Musacchio at Musacchio's comcast.net account the email he had copied from Exel's server with the subject line "Talk between Jim and Dan." On or about November 9, 2005, Musacchio forwarded this email to his wife and admonished her not to say anything about what he was doing.

28. On or about November 9, 2005, Brown made an unauthorized access to Exel's email server and to the email account of Exel's president. Brown forwarded a copy of an email string between Exel's president and Exel's Legal Counsel which had the subject line "Organizational Announcement" to Musacchio with his subject line "They have no idea!!!!!!!!"

29. On or about November 11, 2005, Kelly, began training an Exel employee to replace him. Kelly told the Exel employee how to maintain and operate the

computer systems at Exel and instructed him not to change the system passwords.

30. On or about November 20, 2005, Musacchio sent an email to unindicted coconspirator no. 5, an Exel employee, to thank him for sending Exel's proprietary "Salesperson Comparison" information to him and asking whether he also had YTD figures for sales personnel. 5 had sent the Exel proprietary information without authorization.

31. On or about November 21, 2005, unindicted coconspirator no. 4, an Excel employee, contacted Musacchio concerning a directive he had received from the Excel President and CEO regarding agents. On that date Musacchio emailed unindicted coconspirator no. 2 requesting a meeting to discuss a TTS Board of Directors' resolution that Musacchio believed was needed.

32. Beginning on or about November 23, 2005, and continuing through on or about February 12, ,2006, the TTS user account belonging to Musacchio was used to log onto the Exel mail servers without authorization and to access the email accounts of Exel employees approximately 3,000 times.

33. On or about November 24, 2005, Musacchio emailed Brown from his TTS email account to inform Brown that the Exel web mail server was down and he could not access the email accounts of Exel employees. Musacchio's message read: "When you get a chance, try to get onto ETS's Webmail. Everything was fine last night, but tonight I get an error message that says "Failed to Connect to Mail Server." I didn't do anything that would lock me out. Maybe the server is down?" On November 25, 2005, Brown replied to

Musacchio from his TTS email account that: "Looks like the server is down.....guess we will have to wait until someone figures that out." Musacchio replied: "ok, thanks." Later Brown emailed Musacchio to let him know that he had restarted the Exel email server remotely and said "It's working now.....I restarted it remotely.....I guess they have not changed a single password!"

34. On or about November 26, 2005, Musacchio emailed other persons known to the grand jury, and attached a copy of a confidential Exel memo describing Exel's 2006 Agent Retention/Incentives for keeping agents.

35. On or about November 28, 2005, a person known to the grand jury emailed Musacchio and expressed his concern about the legal risks of sending and receiving Exel documents and stated, "We don't want to give Exel grounds for legal action."

2006

36. On or about January 6, 2006, Brown sent an email to Musacchio in which he wrote "Go into the "email" and look at the sent items for JD."

37. On or about January 6, 2006, Brown made unauthorized access to the Exel email servers, to the account of a person known to the grand jury, and then emailed Musacchio information from the email concerning a hold on the checks of sales agents.

38. On or about January 7, 2006, Musacchio sent an email to Brown, unindicted coconspirators no. 1, no. 3, and other persons known and unknown to the grand jury, in which he asked that they keep "confi-

dential information" that he had provided to them a secret. Musacchio warned them that disclosure of the confidential information would "destroy other people's careers."

39. On or about January 7, 2006, Brown signed an employment offer letter accepting employment with TTS which was countersigned by Musacchio as President and CEO of TTS and which stated that his employment with TTS became effective on October 24, 2005.

40. On or about January 7, 2006, Musacchio sent an email to Brown with the subject line "ETS Email" and, the message "Do you think we are locked out forever??"

41. On or .about January 8, 2006, Brown sent Kelly an email stating "Hey, my back door to you know where is locked out. Do you know another way in?" On or about January 8, 2006, Kelly replied to Brown via email with the user names and passwords for the "Exchange_service," "BESAdmin, " and "Delano.service" administrator-level accounts that enabled Brown to make unauthorized access to Exel's protected computers. Brown emailed Musacchio later with the subject line "Back door Success" and wrote "I AM IN!!!!!!!!!! Several hours later I can see again!"

42. On or about January 12, 2006, Musacchio emailed Brown with the subject line "Load Tech" and with a message that an Exel employee "found out we are using Load Tech." Brown replied by email "Do you know how?" Musacchio then emailed Brown the message "Email said someone told her." Brown emailed back to Musacchio "...I will look in her email tomorrow."

43. On or about January 17, 2006, Musacchio sent an email to Brown with a subject line "Go hunting." The message indicated that Musacchio wanted Brown to look at the email boxes of the Exel president, legal counsel, vice president and another officer. Brown responded that he was heading to dinner, but that when he got to the apartment he would "dig deep."

44. On or about January 18, 2006, Brown made an unauthorized access to the Exel email server and the account of the Exel president. Brown sent an email to Musacchio with the subject line "Unbelievable email between Jim and Dick.....they are paranoid!" to which he attached an email exchange between the Exel president and Exel legal counsel.

45. On or about January 20, 2006, Brown made an unauthorized access to the Exel email server and obtained the Exel Weekly update, Exel's proprietary document, which he emailed to Musacchio and unindicted coconspirator no. 1.

46. On or about January 21, 2006, Brown made unauthorized access to Exel's email server and to the email account of Exel's legal counsel. He then forwarded a message taken from that account with the subject line "RE: From Dick Merrill to an outside attorney" to Musacchio.

47 On or about January 21, 2006, Musacchio made unauthorized access to the Exel email servers and to the account of Exel's legal counsel. He then forwarded an email which had been sent by Exel's legal counsel to another and which discussed the possibility of Exel's phones being tapped. Musacchio then forwarded the email to Brown and discussed it in a series of emails. On January 21, 2006, Musacchio

emailed Brown and told him to "delete everything I sent you I am now deleting everything you and I correspond [sic] as soon as I read it."

48. On or about February 3, 2006, Musacchio emailed Brown with the subject line "Levi sent email info to Damman DELETE AFTER READING."

49. On or about February 23, 2006, Brown made an unauthorized access to the Exel email servers and to the email account of Exel's president. After making the unauthorized access, Brown forwarded to Musacchio a confidential email between Exel's president and a person known to the grand jury which had been sent by the president on or about February 22, 2006 with the subject "Re: Confidential PepsiCo/Frito Lay " Musacchio responded to Brown at his email account at bellsouth.net from Musacchio's email account at TTS.

50. On or about February 23, 2006, Brown made an unauthorized access to the Exel email server and to the email account of Exel's president. After making the unauthorized access, Brown forwarded a confidential email between Exel's president and Exel's vice president which had been sent by the president on or about February 22, 2006 with the subject "RE: Thanks" to Musacchio. Musacchio responded to Brown at his email account at bellsouth.net from Musacchio's email account at TTS.

51. On or about February 23, 2006, Brown made an, unauthorized access to the Exel mail server and to the email account of an Exel employee. After making the unauthorized access, Brown forwarded a confideniial email string between Exel's president and another Exel employee known to the grand jury

to Musacchio with the subject line "Long.....but good." Musacchio used his email account at TTS, and replied to Brown at Brown's email address at bellsouth.net and included the message "This is a good one! Looks like we are in good shape. Sent From Blackberry Handheld, Please Excuse Typos."

52. On or about February 23, 2006, Brown made an unauthorized access to the Exel mail server and to the email account of Exel's president. After making the unauthorized access, Brown forwarded a confidential email which was copied to the president and others known to the grand jury to Musacchio with the subject line "He sounds pist! [sic]." Musacchio replied from his email account at tts-us.com to Brown at his email account at bellsouth.net with the message "Maybe time to call him?..."

53. On or about February 23, 2006, Brown made an unauthorized access to the Exel mail server and to the email account of an Exel employee. After making the unauthorized access, Brown forwarded a confidential email between Exel's president and another person known to the grand jury which had the subject line "Re: American Suzuki." The content of the email discussed the loss of an account for American Suzuki to Musacchio. Musacchio used his email account at TTS and replied to Brown via email at his bellsouth.net with the statement "Well, now they know ...."

54. On or about February 23, 2006, Brown made an unauthorized access to the Exel email server and to the account of Exel's president. After making the unauthorized access, Brown forwarded a copy of a confidential email between Exel's president and a

person known to the grand jury which had a subject line "Key People," and which discussed providing an incentive to prevent losing key personnel to Musacchio. Musacchio used his TTS email account to reply to Brown at his bellsouth.net account with the message: "Throw more money after something we are not after!..."

55. On or about February 24, 2006, Brown made an unauthorized access to the Exel email servers and to the account of Exel's vice president. After making the unauthorized access, Brown forwarded a confidential email to Musacchio. The confidential email was between the vice president and another person known to the grand jury which had been sent by the vice president on or about that date with the subject line "Letter going to West Farm." Musacchio replied to Brown at his bellsouth.net on the same date from his email account at tts-us.com. In an exchange of emails, Musacchio responded to Brown "...We cannot do anything unwise at this time."

56. On or about February 25, 2006, Brown made an unauthorized access to the Exel email servers and to the email account of an Exel employee and obtained an email that Exel's president and another Exel employee had received on that date from the vice president. The email to the president contained the subject line "FW: update information on the action items of the day." After making the unauthorized access, Brown forwarded a copy of the email to Musacchio with a blank subject line. Musacchio replied to Brown's email account at Brown's bellsouth.net account from his email account at tts-us.com.

57 On or about March 7, 2006, Brown made an unauthorized access to the Exel email servers and to the email account of Legal Counsel for Exel. Brown used his email account at bellsouth.net, and forwarded to Musacchio at his TTS email account, correspondence from Exel Legal Counsel to another person known to the grand jury with subject line "RE: Personal Computer Chain of Custody" which described Exel's internal investigation into data breaches at Exel, including the unauthorized destruction of data by Brown and unauthorized removal of equipment by Kelly.

58. On or about March 16, 2006, Brown made unauthorized access to Exel email servers, after which he sent Musacchio a copy of a confidential internal Exel email, with the subject line "Remember to completely delete" and the email sensitivity as "Private." The email was responded to by Musacchio from an email account assigned to him by TTS, and was sent to an email account assigned to Brown by TIS. Musacchio's response was "Well! We are getting into better and better position! Thank you for getting this info."

59. On or about March 17, 2006, Brown made an unauthorized access to the Exel email servers and to the account of Exel's president, and obtained Exel's proprietary information contained in internal emails between Exel's president and a person known to the grand jury. On or about March 18, 2006, Musacchio and Brown exchanged emails with the subject line "Re: Very long but very good information" in which they debated the merits of an email chain between

Exel employees which discussed an important Exel client.

60. On or about March 18, 2006, Brown made unauthorized access to the Exel email server and to the account of Exel's president. Brown sent a copy of emails between the president and others known to the grand jury to Musacchio from his email account at bellsouth.net with the subject line "Dan is outa there!" Musacchio replied to Brown's email from his email account at TTS.

61. On or about March 24, 2006, in an email string between Musacchio and Brown, Musacchio instructed Brown "if you go fishing, please look for anything about Mitsubishi quotes by someone." Brown replied "I am fishing right now actually. Lisa and Julie disappeared from the meeting and Todd thinks they are over at our office...." Musacchio responded "they are." Later that day. Brown emailed Musacchio with the subject line "Bad News" and informed him "it appears my fishing hole has dried up ... no more fishing." **Musacchio** responded "Why?"

All in violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(C);(c)(2)(B)(i)-(iii) (unauthorized access and exceeding authorized access to protected computer)).

Counts 2 22

Exceeding Authorized Access to Protected Computers

(Violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii) and 1030(b))

Aiding and Abetting

(Violation of 18 U.S.C. § 2)

1. The grand jury hereby realleges and incorporates the allegations set out in paragraphs 1-8 of the Introduction and Count 1 of the Indictment.

2. On or about the dates indicated below, for each count below, in the Dallas Division of the Northern District of Texas and elsewhere, defendant, Joseph Taylor (Roy) Brown, aided and abetted by defendant John Michael Kelly, did knowingly and intentionally access without authorization, and attempted to access without authorization, a protected computer as defined at 18 U.S.C. § 1030(e)(2)(B), specifically, to intentionally access a computer without authorization, and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain and in furtherance of a criminal and tortious act in violation of the U S. Constitution or laws of the United States or of any state, including the State of Texas, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii), and as a direct result accessed emails and attached documents contained in the email accounts of Exel officers and employees, as described below:

COUNT	DATE	EXEL EMAIL ACCOUNT(S)
2	11/07/2005	Exel's President
3	11/08/2005	Exel's President
4	11/09/2005	Exel's President
5	01/06/2006	Exel's President
6	01/08/2006	Exel's President

7	01/18/2006	Exel's President
8	01/20/2006	Exel Server
9	01/21/2006	Exel's Legal Counsel
10	02/23/2006	Exel's President
11	02/23/2006	Exel's President
12	02/23/2006	Exel's President
13	02/23/2006	Exel's President
14	02/23/2006	Exel's President
15	02/23/2006	Exel's President
16	02/24/2006	Exel's Vice-President
17	02/25/2006	Exel Server
18	03/07/2006	Exel's Legal Counsel
19	03/16/2006	Exel Server
20	03/17/2006	Exel's President
21	03/18/2006	Exel's President
22	03/18/2006	Exel's Vice-President

All in violation of 18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii) and 2.

Counts 23 - 24

Unauthorized Access to Protected Computers

(Violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii))

1. The grand jury hereby realleges and incorporates the allegations set out in paragraphs 1- 8 of the Introduction and Count 1 of the Indictment.

2. On or about the dates indicated below, for each count below, in the Dallas Division of the Northern District of Texas and elsewhere, defendant, Michael Musacchio, did knowingly and intentionally access

without authorization, and attempted to access without authorization, an Exel protected computer, as defined at 18 U.S.C. § 1030(e)(2)(B), specifically, to intentionally access a computer without authorization, and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain and in furtherance of a criminal and tortious act in violation of the Constitution or laws of the United States or of any state, including the State of Texas, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii), and as a direct result accessed emails and attached documents contained in the email accounts of Exel officers and employees, as described below:

COUNT	DATE	EXEL EMAIL ACCOUNT(S)
23	11/24/2005	Exel Server
24	01/21/2006	Exel's Legal Counsel

All in violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii).

A TRUE BILL
s/ [illegible signature]
FOREPERSON

JAMES T. JACKS
UNITED STATES ATTORNEY
By:
s/ Linda Groves
LINDA C. GROVES

Assistant United States Attorney
Texas Bar No. 08553100
1100 Commerce Street, Third Floor
Dallas, Texas 75242
Telephone: 214.659.8600
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL MUSACCHIO (1)
JOSEPH TAYLOR (ROY) BROWN (2)
JOHN MICHAEL KELLY (3)

INDICTMENT

18 U.S.C. § 371 and (18 U.S.C. § 1030(a)(2)(C); (c)(2)(B)(i)-(iii»

Conspiracy to Make Unauthorized Access to Protected Computer

and to Exceed Authorized Access to Protected Computer

18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii) andI030(b)

Exceeding Authorized Access to Protected Computers

18 U.S.C. § 2

Aiding and Abetting

18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii)

Unauthorized Access to Protected Computers

24 Counts

A true bill rendered:

s/ [illegible signature]

DALLAS FOREPERSON

Filed in open court this 2nd day of November, A.D. 2010.

Clerk

WARRANT TO ISSUE AS TO DEFENDANTS: MICHAEL MUSACCHIO, JOSEPH TAYLOR (ROY) BROWN and JOHN MICHAEL KELLY

UNITED STATES DISTRICT/MAGISTRATE JUDGE

Magistrate Case Number Pending: 3:08-MJ-135 (Search Warrant)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

1. Defendant Information

Juvenile:

If Yes, Matter to be sealed:

☐Yes ☒No

Related Case Information

Superseding Indictment: ☐Yes ☒No New Defendant: ☒Yes ☐No

Pending CR Case in NDTX: ☐Yes ☒No If Yes, number:

Search Warrant Case Number: 3:08-MJ-1358

R 20 from District of _____

Magistrate Case Number: N/A

Defendant Name MICHAEL MUSACCHIO (1)

Alias Name _____

Address _____

County in which offense was committed: Dallas, Texas

2. U.S. Attorney Information 3-10CR0308-P
AUSA LINDA C. GROVES Texas Bar No. 08553100

3. Interpreter
☐Yes ☒No If Yes, list language and/or dialect: _____

4. Location Status WARRANT TO ISSUE
Arrest Date
☐ Already in Federal Custody
☐ Already in State Custody
☐On Pretrial Release

5. U.S.C. Citations
Total # of Counts as to This Defendant: ☐ Petty ☐ Misdemeanor ☒ Felony

Citation	**Description of Offense Charged Count(s)**
18 U.S.C. § 371 and (18 U,S.C. § 1030(a)(2)(C); (c)(2)(B)(i)-(iii))	Conspiracy to Make Unauthorized Access 1 to Protected Computer and to Exceed
18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii)	Authorized Access to Protected Computer Unauthorized Access to Protected Computers 23-24

Date: November 1, 2010 Signature of AUSA: _____

UNITED STATES DISTRICT COURT
- NORTHERN DISTRICT OF TEXAS

1. Defendant Information

Juvenile:

If Yes, Matter to be sealed:

☐Yes ☒No

Related Case Information

Superseding Indictment: ☐Yes ☒No New Defendant: ☒Yes ☐No

Pending CR Case in NDTX: ☐Yes ☒No If Yes, number:

Search Warrant Case Number: 3:08-MJ-1358

R 20 from District of _____

Magistrate Case Number: N/A

Defendant Name JOSEPH TAYLOR (ROY) BROWN (2)

Alias Name _____

Address _____

County in which offense was committed: Dallas, Texas

2. U.S. Attorney Information 3-10CR0308-P

AUSA LINDA C. GROVES Texas Bar No. 08553100

3. Interpreter

☐Yes ☒No If Yes, list language and/or dialect: _____

4. Location Status WARRANT TO ISSUE

Arrest Date -

☐ Already in Federal Custody
☐ Already in State Custody

☐On Pretrial Release

5. U.S.C. Citations

Total # of Counts as to This Defendant: ☐ Petty ☐ Misdemeanor ☒ Felony

Citation	Description of Offense Charged Count(s)
18 U.S.C. § 371 and (18 U,S.C. § 1030(a)(2)(C); (c)(2)(B)(i)-(iii))	Conspiracy to Make Unauthorized Access 1 to Protected Computer and to Exceed
18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii)	Authorized Access to Protected Computer Unauthorized Access to Protected Computers 23-24
Date: November 1, 2010	Signature of AUSA: _____

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

1. Defendant Information

Juvenile:

If Yes, Matter to be sealed:

☐Yes ☒No

Related Case Information

Superseding Indictment: ☐Yes ☒No New Defendant: ☒Yes ☐No

Pending CR Case in NDTX: ☐Yes ☒No If Yes, number:

Search Warrant Case Number: 3:08-MJ-1358

R 20 from District of

Magistrate Case Number: N/A

Defendant Name JOHN MICHAEL KELLY (3)

Alias Name

Address

County in which offense was committed: Dallas, Texas

2. U.S. Attorney Information 3-10CR0308-P

AUSA LINDA C. GROVES Texas Bar No. 08553100

3. Interpreter

☐Yes ☒No If Yes, list language and/or dialect:

4. Location Status WARRANT TO ISSUE

Arrest Date -

☐ Already in Federal Custody
☐ Already in State Custody
☐On Pretrial Release

5. U.S.C. Citations

Total # of Counts as to This Defendant: ☐ Petty ☐ Misdemeanor ☒ Felony

Citation	**Description of Offense Charged Count(s)**
18 U.S.C. § 371 and (18 U,S.C. § 1030(a)(2)(C); (c)(2)(B)(i)-(iii))	Conspiracy to Make Unauthorized Access 1 to Protected Computer

18 U.S.C. 1030(a)(2)(C); (c)(2)(B)(i)-(iii)	§§	and to Exceed Authorized Access to Protected Computer Unauthorized Access to Protected Computers 23-24
Date: November 1, 2010		Signature of AUSA: _____

SUPERSEDING INDICTMENT, SEPT. 6, 2012 [EXCERPT]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	No. 3:10-CR-00308-P
v.	§	
	§	**(Supersedes**
MICHAEL	§	**indictment returned**
MUSACCHIO (1)	§	**on November 2, 2010)**
	§	
	§	

* * *

[pages 4-6]

Count One

Conspiracy To Make Unauthorized Access to Protected Computer (Violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i) and (iii)(unauthorized access))

1. The Grand Jury realleges and incorporates the allegations of paragraphs 1-8 of the Introduction to the Indictment.

Object of the Conspiracy

2. From at least in or about April 2004, and continuing through in or about March 2006, in the Dallas Division of the Northern District of Texas, and elsewhere, defendant **Michael Musacchio,** did unlawfully, willfully, and knowingly combine, conspire, confederate and agree with Joseph Roy Brown and Michael Joseph Kelly, and with other persons known and unknown to the Grand Jury to commit offenses against the United States, specifically, to intentionally access a computer without authorization and exceed authorized access to a protected computer, as defined at 18 U.S.C. § 1030(e)(2)(B), and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i) and (iii) (unauthorized access to a protected computer)).

Manner and Means

A. **Musacchio** and Brown made unauthorized accesses and exceeded authorized access to Exel's protected computers including the Exel mail server from their personal internet accounts, their assigned user accounts at the offices of TTS, and the administrator accounts at Exel, and obtained Exel emails, email attachments, and other business documents containing Exel's confidential and proprietary information. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly, and the unindicted coconspirators.

B. **Musacchio** and Brown obtained administrative passwords and login information to Exel's protected computers from Kelly and made unauthorized accesses and exceeded any authorized access to Exel's protected computers. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly and the unindicted coconspirators.

C. **Musacchio** directed unindicted coconspirators, who were employed by Exel during the time of the conspiracy, to exceed any authorized access to Exel's protected computers, and to obtain Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. He did so to provide a commercial advantage and private financial gain to himself, TTS, Brown, Kelly and the unindicted coconspirators.

D. Brown made unauthorized accesses to and exceeded his authorized access to Exel's protected computers and obtained Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. Brown frequently forwarded Exel's confidential, proprietary emails and documents to **Musacchio** and other unindicted coconspirators. He did so to provide a commercial advantage and private financial gain to himself, TTS, **Musacchio**, Kelly and the unindicted coconspirators.

* * *

32. Beginning on or about November 23, 2005, and continuing through on or about February 12, 2006, user accounts belonging to Musacchio including his TTS user account were used to log onto Exel's email servers without authorization, and to make approxi-

mately 3,000 unauthorized accesses to emails and attachments belonging to Exel employees.

33. On or about November 24, 2005, Musacchio emailed Brown from his TTS email account to inform Brown that the Exel web mail server was down and he could not access the email accounts of Exel employees. Musacchio's message read: "When you get a chance, try to get onto ETS's Webmail. Everything was fine last night, but tonight I get an error message that says 'Failed to Connect to Mail Server.' I didn't do anything that would lock me out. Maybe the server is down?" On November 25, 2005, Brown replied to Musacchio from his TTS email account that: "Looks like the server is down.....guess we will have to wait until someone figures that out." Musacchio replied: "ok, thanks." Later Brown emailed Musacchio that he had restarted Exel's email server remotely and said "It's working now.....I restarted it remotely.....I guess they have not changed a single password!"

* * *

[page 23]

* * *

Counts 2-3

Unauthorized Access to Protected Computers

(Violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i) and (iii))

1. The grand jury hereby realleges and incorporates the allegations set out in paragraphs 1 8 of the Introduction and Count 1 of the Indictment.

2. On or about the dates indicated below, for each count below, in the Dallas Division of the Northern District of Texas and elsewhere, defendant, **Michael Musacchio**, did knowingly and intentionally access without authorization, and attempted to access without authorization, an Exel protected computer, as defined at 18 U.S.C. § 1030(e)(2)(B), specifically, to intentionally access a computer without authorization, and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i) and (iii), and as a direct result accessed emails and attached documents contained in the email accounts of Exel officers and employees, as described below:

COUNT	DATE	EXEL EMAIL ACCOUNT(S)
2	11/23-25/2005	Exel email accounts of Exel President and Excel legal counsel
3	01/21/2006	Exel's Legal Counsel

All in violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i) and (iii).

* * *

GOVERNMENT'S PROPOSED JURY INSTRUCTIONS, SEPT. 7, 2012 [EXCERPTS]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
V	§	CRIMINAL NO.
	§	3:10-CR-00308-P
	§	(ECF)
MICHAEL MUSACCHIO (1)	§	
	§	

GOVERNMENT'S PROPOSED JURY
INSTRUCTIONS

The United States of America submits the attached proposed Jury Instructions. Pursuant to Rule 30 of the Fed. R. Crim. P., respectfully requests the Court to include the attached instructions in its charge to the jury, and requests leave to offer such other and additional instructions as may become appropriate during the course of the trial.

The requested jury instructions deal with the essential elements of the crimes charged in the indictment and certain matters of evidence for which the Court might require instructions to the jury. The Government assumes that the Court's charge con-

cerning general matters will be charged by the Court in terms similar to those usually employed by the Court.

* * *

GOVERNMENT REQUESTED INSTRUCTION
NO. 14

CONSPIRACY

Count One of the Superseding Indictment charges:

[Please read Count One]

The defendant, MICHAEL MUSACCHIO, is charged with conspiring to commit Unauthorized Access to Protected Computers in Count One of the Superseding Indictment. The object of the conspiracy, Unauthorized Access to Protected Computer(s), is charged in Counts Two and Three of the Superseding Indictment and I will instruct you as to the elements of that crime later in my instructions.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to commit the crime of Unauthorized Access to Protected Computer(s) as charged in the Superseding Indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the Superseding Indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the superseding indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.[13]

* * *

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[13] Fifth Circuit Criminal Jury Instructions, 2001, § 2.20 [modified].

SECOND SUPERSEDING INDICTMENT, JAN. 8, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	No. 3:10-CR-00308-P
v.	§	
	§	**(Supersedes**
MICHAEL	§	**indictments returned**
MUSACCHIO (1)	§	**on November 2, 2010**
	§	**and September 6,**
	§	**2012)**

SECOND SUPERSEDING INDICTMENT

The Grand Jury Charges:

Introduction

At all times material to this indictment:

1. Exel Transportation Services, Inc. (Exel), formerly known as Mark VII Transportation Co., Inc. (Mark VII), had offices in Addison, Texas, Memphis, Tennessee, and elsewhere, and conducted business in the Northern District of Texas, Dallas Division, and elsewhere.

2. Total Transportation Services LLC conducted business in the Northern District of Texas, Dallas Di-

vision, and elsewhere as Worldwide Total Transportation Services GP LLC and was the general partner of the entity operated as Total Transportation Services LP doing business as Worldwide Total Transportation Services LP Total Transportation Services LLC and Total Transportation Services LP operated as Total Transportation Services (TTS). TTS was formed in or about November 2005.

3. TTS and Exel were competitors. Exel was a third party logistics company or intermodal marketing company which provided transportation and supply chain management products and services that facilitated the links between shippers and common carriers in the manufacturing, retail and consumer industries. Exel entered into contracts with independent agents and independent sales agents. Through these contractual arrangements and the utilization of in-house sales agents, Exel connected shipping customers with appropriate carriers and provided products, services and technology to assist its customers to transport goods. TTS, as Exel's competitor, was also a third party logistics company which offered similar types of business services and products, and utilized similar types of contracts with independent agents and independent sales agents.

4. Michael Musacchio, from in or about 1992, and continuing through on or about September 9,2004, was employed by Exel and its predecessor Mark VII in high level supervisory, management and officer positions. From in or about 2000, through in or about September 9, 2004, Musacchio was the President and Chief Executive Officer (CEO) of Exel. Musacchio left his position with Exel on or about September 9, 2004.

From in or about November 2005, through in or about April 2006, Musacchio was employed by TTS as the President and CEO. Musacchio was one of the initial Directors on the Board of Directors of TTS and held equity ownership in TTS.

5. Joseph Roy Brown, also known as Roy Brown, worked for Exel and its predecessor Mark VII from in or about August 1999, until in or about October 2005. At the time Brown left Exel, Brown's position was Vice President of Agency Support. Brown agreed to accept a position with TTS in or about October 2005, as the Vice President for Information Technology. From in or about October 2005, through in or about April 2006, Brown was employed by TTS.

6. John Michael Kelly worked for Exel from on or about October 2, 2000, until his resignation on or about October 27, 2005. At the time of his resignation, Kelly worked as the Senior Network Engineer for Exel. As an information technology specialist or network administrator, Kelly had administrator level access to all of the networked computers and internal email systems at Exel, including administrator-level access to Exel's computer network. After leaving Exel, until on or about October 27, 2010, Kelly was employed as Manager IT-Infrastructure for TTS.

7. At all times relevant to this indictment, Exel's computers which were used to access the email for Exel were located in both the Northern District of Texas, and Memphis, Tennessee. In addition, Musacchio, Brown and Kelly, while employed by Exel, performed work at the Exel offices in Addison, Texas. Musacchio was bound by non-compete and non-solicitation agreements while employed by Exel

and until on or about January 18, 2005, after leaving Exel.

8. Unindicted coconspirators KS, RE, JV and SB were employees of Exel. KS, JV and RE became employees of TTS after Musacchio and Brown left Exel. Unindicted coconspirators DL and HO were financiers.

Count One

Conspiracy To Make Unauthorized Access to Protected Computer (Violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii)(unauthorized access))

1. The Grand Jury realleges and incorporates the allegations of paragraphs 1-8 of the Introduction to the Indictment.

Object of the Conspiracy

2. From at least in or about April 2004, and continuing through in or about March 2006, in the Dallas Division of the Northern District of Texas, and elsewhere, defendant Michael Musacchio, did unlawfully, willfully, and knowingly combine, conspire, confederate and agree with Joseph Roy Brown and Michael Joseph Kelly, and with other persons known and unknown to the Grand Jury to commit offenses against the United States, specifically, to intentionally access a computer without authorization and exceed authorized access to a protected computer, as defined at 18 U.S.C. § 1030(e)(2)(B), and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain, and the value of the information obtained ex-

ceeded $5,000, in violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii) (unauthorized access to a protected computer)).

Manner and Means

A. Musacchio and Brown made unauthorized accesses and exceeded authorized access to Exel's protected computers including the Exel mail server from their personal internet accounts, their assigned user accounts at the offices of TTS, and the administrator accounts at Exel, and obtained Exel emails, email attachments, and other business documents containing Exel's confidential and proprietary information. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly, and the unindicted coconspirators.

B. Musacchio and Brown obtained administrative passwords and login information to Exel's protected computers from Kelly and made unauthorized accesses and exceeded any authorized access to Exel's protected computers. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly and the unindicted coconspirators.

C. Musacchio directed unindicted coconspirators, who were employed by Exel during the time of the conspiracy, to exceed any authorized access to Exel's protected computers, and to obtain Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. He did so to provide a commercial advantage and private financial gain to himself, TTS, Brown, Kelly and the unindicted coconspirators.

D. Brown made unauthorized accesses to and exceeded his authorized access to Exel's protected computers and obtained Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. Brown frequently forwarded Exel's confidential, proprietary emails and documents to Musacchio and other unindicted coconspirators. He did so to provide a commercial advantage and private financial gain to himself, TTS, Musacchio, Kelly and the unindicted coconspirators.

E. Brown obtained administrative passwords and login information to Exel's protected computers from Kelly and provided the passwords and login information to Musacchio to enable him to make unauthorized accesses to the protected computers of Exel and to defraud Exel of its proprietary information and business documents for the benefit of Musacchio, Brown, Kelly, the unindicted coconspirators and TTS.

F Kelly, while employed by Exel, instructed an Exel IT employee that he should not change the administrative passwords on the Exel computer servers even after Kelly and Brown left Exel or the computer system would crash. The retention of the same administrative passwords enabled continued unauthorized access to Exel's protected computers after Kelly, Brown, and Musacchio left Exel's employment and became employees of TTS, Exel's competitor.

G. Kelly provided the Exel passwords and login information to Brown. Brown provided the Exel passwords and login information to Musacchio, to enable both Brown and Musacchio to make unauthorized accesses to the protected computers of Exel. He did so

to provide a commercial advantage and private financial gain to Musacchio, Brown, Kelly, the unindicted coconspirators, and TTS.

Overt Acts

In furtherance of the conspiracy and to achieve its objects, defendant Michael Musacchio, coconspirator Joseph Roy Brown, and coconspirator John Michael Kelly, committed and caused to be committed, among others, the following overt acts in the Northern District of Texas, and elsewhere:

2004-2005

1. In or about April 2004, Musacchio and unindicted coconspirators DL and HO, discussed the funding for the formation of a new company, later to be called TTS, which would compete with Exel in the transportation services industry. The participants agreed upon the initial management group of TTS. Unindicted coconspirators DL and HO knew that Musacchio was obtaining Exel's proprietary and confidential information for the benefit of TTS.

2. On or about September 7, 2004, Musacchio resigned from his position as president of Exel effective September 9, 2004. On or about September 7, 2004, Musacchio and Brown discussed how Musacchio could access Exel's protected computers without authorization after Musacchio left Exel's employment.

3. On or about September 30, 2004, Musacchio sent an email with attachment to unindicted coconspirators DL and HO from his personal comcast.net account with the message "here is the ETS 2005 budget plan." The attachment was the budget plan which was dated after Musacchio had left Exel.

4. On or about December 21, 2004, Brown exceeded his authorized access to the Exel's email server and to the email account of an Exel employee known to the grand jury. Brown used his Blackberry and sent information he had obtained from the Exel employee's account to Musacchio at Musacchio's comcast.net email account with the message: "Some email between Jim and Andrew.....Maybe ETS is for sale?"

5. On or about January 7, 2005, Brown exceeded authorized access to the Exel's email server and to the account of a person known to the grand jury. Brown used his bellsouth.net account to send information from that account to Musacchio at his comcast.net account with the subject line "You will enjoy this....." Musacchio replied by email to Brown "This is great stuff! Thanks."

6. On or about February 21, 2005, an Exel employee known to the grand jury sent an email to Musacchio in which he asked Musacchio not to send items to his Exel email account due to the "covertness of this operation."

7 On or about April 22, 2005, Brown, while working at Exel, exceeded his authorized access and accessed the Exel email accounts for Exel employees. Brown sent information containing Exel proprietary business plans to Musacchio at Musacchio's comcast.net account. Musacchio replied to Brown by return email and made the following request: "Roy, if you can keep watch for replies to this email or anything else related to it, that would be very helpful!" Brown responded "Doing my best."

8. On or about May 16, 2005, Musacchio and an independent agent met with other persons known to

the grand jury to discuss a revised business plan for a new business entity which would compete with Exel.

9. On or about August 23, 2005, Brown and Musacchio exchanged emails in which Brown provided Musacchio with some ofExel's proprietary agency information which he had obtained from Exel's email accounts by exceeding his authorized access to Exel's servers. Musacchio emailed Brown that "this will be helpful," then directed Brown to provide additional emails from the email account of Exel's president. Brown responded that it was possible for him to provide additional emails from that account and asked if there was specific information he should look for.

10. On or about August 29, 2005, Brown exceeded his authorized access and forwarded an email message sent from bill.reed@ets.exel.com to Brown at his Exel account. Brown forwarded this message to his home email account with bellsouth.net. Brown then forwarded the message from his home account to Musacchio at Musacchio's comcast.net account.

11. On or about September 1, 2005, Brown emailed Exel's proprietary information to Musacchio concerning the possible future acquisition of Exel. Musacchio responded to Brown that "This could not be better news," and Brown replied "...this...is going to fall right into our plan."

12. On or about September 20, 2005, Brown exceeded his authorized access to Exel's email server and to the account of the Exel president. He used his bellsouth.net account to send information from the president's Exel account concerning the president's board presentation with an attachment to Musacchio

at Musacchio's comcast.net account. Musacchio replied to Brown "you are the Man!"

13. On or about September 20, 2005, Brown exceeded his authorized access to Exel's email server and to the email account of Exel's president, and obtained a file "Phantom Stock Option programme.xls." He then used his bellsouth.net account to send the file to Musacchio at Musacchio's comcast.net account. Musacchio replied by email: "You are on fire! Take a look at Toad's email and see if he is sucking up to Jim!" Brown then responded: "he is about as much out of the loop as Steve. I have looked but to no great findings [sic]."

14. Beginning on or about September 20, 2005, and continuing through March 25, 2006, accounts assigned to Brown including his TTS user account used servers including the TTS servers to log onto the Exel servers. Brown exceeded his authorized access to Exel servers in this manner prior to leaving Exel on October 17, 2005, and acted without authorized access after that date. While logged on, Brown's accounts accessed the emails and attachments of Exel's president, vice president and other Exel employees more than 300 times.

15. On or about September 21, 2005, Brown exceeded his authorized access to the Exel's email server and to the email account of the Exel president. He used his bellsouth.net account to send information obtained from an email the Exel president sent to another employee's account to Musacchio at Musacchio's comcast.net account with the subject line "From Jim to Andrew." On that date Brown also exceeded authorized access to the Exel's email server, and used

his bellsouth.net account to send to Musacchio at Musacchio's comcast.net account an email with attachments concerning proposed corporate changes which was sent from the Exel president to "Andrew/Tony."

16. On or about October 10, 2005, Brown exceeded authorized access to Exel's email server. Brown sent an email from his bellsouth.net account containing information obtained from the Exel president's email account to Musacchio at Musacchio's comcast.net account with the subject line: "Interesting reading ....."

17. Later, on or about October 10, 2005, Musacchio replied to Brown's email: "This is great! ...as long as Exel has something else to focus on, it will keep us off of their radar screen! ....Isn't there a way (when the time is right for us to write and email as Brad to Jim and really make some bogus shit up for them to get excited about? [sic]" Brown responded "Yes and it sounds like fun ... that would really [expletive deleted] with their heads!" Musacchio then emailed to Brown "I would like to compose an email from Brad to Jim. Can we do it and not have it traced?" On or about October 11, 2005, Brown responded "Yes, of course."

18. On or about October 13, 2005, Brown exceeded his authorized access to Exel's email server and to the email account of Exel's president. Brown used his bellsouth.net account and sent information from the president's email account to Musacchio at Musacchio's comcast.net account with the subject line: "RE: You will enjoy this ....." Musacchio replied by email and wrote: "Thanks. Now the next question is, how are we going to get into email after you

leave?" Brown replied: "Not a problem.....! have the back door password that only I know and no one else can change." Musacchio emailed back to Brown "beauty!"

19. On or about October 14, 2005, Musacchio emailed Brown from his comcast.net account with the subject line "Follow Up," and directed Brown to "Please keep looking in Brad's email to see if there id [sic] any information being passed to him from Frito-Lay about a meeting 1 will be having with them. Thanks."

20. On or about October 26,2005, Brown sent Musacchio information obtained from an email from Exel Legal Counsel to Exel's president that Brown obtained by an unauthorized access to Exel's email server. The email to Musacchio had the subject line "from Dick to Jim."

21. On or about October 29, 2005, Musacchio emailed Brown and directed "When you are perusing Jim or Andrew's email, please look for monthly/weekly financials. Thanks." Brown replied by email "What month do you want? I have everything up until I left which is through September. October numbers will be next week."

22. Before Brown left Exel's employment, Kelly showed Brown how to access Exel's email system via the internet. Kelly showed Brown how to use an administrator level account to access Exel employees' individual email accounts.

23. On or about October 27, 2005, Musacchio forwarded an email to unindicted coconspirator DL which Brown had obtained without authorization from Exel servers. The email which Brown sent to

Musacchio, and Musacchio then forwarded, was from Exel counsel to the Exel president concerning the fact that no Federal Maritime Commission Application existed for Musacchio.

24. On or about November 1, 2005, Brown made unauthorized access to the Exel's email server and accessed the email account of the Exel president. He then used his bellsouth.net account to send information from an email in the president's email account to Musacchio at Musacchio's comcast.net account with the subject line: "How funny is this shit!"

25. On or about November 3, 2005, unindicted coconspirator KS used her Hotmail account and sent an email to Musacchio containing information about phone calls she had overheard Exel's president making at Exel's office. Musacchio thanked her and told her "this is good stuff." Musacchio then used his comcast.net email account to email Brown with the subject line "FW: Edie, and other misc. gossip." In the email Musacchio wrote: "Confidential to you, but stay close to Jim's email. This is going to get interesting! Please do not let KS know that I passed this to you! Thanks." Brown responded from his bellsouth.net email account and stated " I will get back in the email and see what all is taking place."

26. On or about November 7, 2005, Brown made unauthorized access to Exel's email server and accessed the email account of the Exel president. He then used his bellsouth.net account to send information obtained from an email in the president's account to Musacchio at Musacchio's comcast.net account with the subject line: "From Jim to Dan/Andrew/Tony." On or about November 8, 2005,

Musacchio sent the email he had received from Brown to unindicted coconspirator KS with the message, "You didn't see this. ok."

27 On or about November 8, 2005, Brown made an unauthorized access to Exel's email server and the account of Exel's president and sent information from that account to Musacchio's comcast.net account. The email information which Brown sent had the subject line "Talk between Jim and Dan." On or about November 9, 2005, Musacchio forwarded this email to his wife and admonished her not to say anything about what he was doing.

28. On or about November 9, 2005, Brown made an unauthorized access to Exel's email server and to the email account of Exel's president. Brown sent information obtained from an email in that account to Musacchio. The information included a copy of an email string between Exel's president and Exel's Legal Counsel which had in the subject line "Organizational Announcement" to Musacchio with his subject line "They have no idea!!!!!!!!" Musacchio forwarded Brown's email to his wife using his comcast.net account.

29. On or about November 11, 2005, Kelly began training an Exel employee to replace him. Kelly told the Exel employee how to maintain and operate the computer systems at Exel and cautioned him that changing the system passwords would likely cause the system to crash.

30. On or about November 20, 2004, Musacchio sent an email to unindicted coconspirator SB, an Exel employee, to thank him for sending Exel's proprietary "Salesperson Comparison" information to him and

asked SB whether he also had YTD figures for sales personnel. SB had sent the Exel proprietary information without authorization.

31. On or about November 21, 2005, Musacchio emailed unindicted coconspirator DL requesting a meeting to discuss a TTS Board of Directors' resolution that Musacchio believed was needed, based on information he had received from unindicted coconspirator RE, an Exel employee, concerning a directive he had received from the Exel President and CEO regarding agents.

32. Beginning on or about November 23, 2005, and continuing through on or about February 12, 2006. user accounts belonging to Musacchio including his TTS user account were used to log onto Exel's email servers without authorization, and to make approximately 3,000 unauthorized accesses to emails and attachments belonging to Exel employees.

33. On or about November 24, 2005, Musacchio emailed Brown from his TTS email account to inform Brown that the Exel web mail server was down and he could not access the email accounts of Exel employees. Musacchio's message read: "When you get a chance, try to get onto ETS's Webmail. Everything was fine last night, but tonight I get an error message that says 'Failed to Connect to Mail Server.' I didn't do anything that would lock me out. Maybe the server is down?" On November 25, 2005, Brown replied to Musacchio from his TTS email account that: "Looks like the server is down.....guess we will have to wait until someone figures that out." Musacchio replied: "ok, thanks." Later Brown emailed Musacchio that he had restarted Exel's email server remotely

and said "It's working now.....I restarted it remotely.....I guess they have not changed a single password!"

34. On or about November 26, 2005, Musacchio emailed other persons known to the grand jury, and attached a copy of a confidential Exel memo describing Exel's 2006 Agent Retention/Incentives for keeping agents.

35. On or about November 28, 2005, a person known to the grand jury emailed Musacchio and expressed his concern about the legal risks of sending and receiving Exel documents and stated, "We don't want to give Exel grounds for legal action."

2006

36. On or about January 6, 2006, Brown sent an email to Musacchio in which he wrote "Go into the "email" and look at the sent items for JD."

37 On or about January 6, 2006, an unauthorized access to Exel's email servers was made to the account of an Exel employee known to the grand jury, and then Musacchio sent Brown information concerning a hold on the checks of sales agents from the employee's email account.

38. On or about January 7, 2006, Musacchio sent an email to Brown, unindicted coconspirators KS, JV, and other persons known and unknown to the grand jury, in which he asked that they keep "confidential information" that he had provided to them a secret. Musacchio warned them that disclosure of the confidential information would "destroy other people's careers."

39. On or about October 21, 2005, Brown signed an employment offer letter accepting employment with TTS effective October 24, 2005.

40. On or about January 7, 2006, Musacchio sent an email to Brown with the subject line "ETS Email" and the message "Do you think we are locked out forever??"

41. On or about January 8, 2006, Brown sent Kelly an email stating "Hey my back door to you know where is locked out. Do you know another way in?" On or about January 8, 2006, Kelly replied to Brown via email with the user names and passwords for the "Exchangeservice," "BESAdmin," and "Delano.service" administrator-level accounts that enabled Brown to make unauthorized access to Exel's protected computers. Brown emailed Musacchio later with the subject line "Back door Success" and wrote "I AM IN!!!!!!!!!! Several hours later I can see again!"

42. On or about January 12, 2006, Musacchio emailed Brown with the subject line "Load Tech" and with a message that an Exel employee "found out we are using Load Tech." Brown replied by email "Do you know how?" Musacchio then emailed Brown the message "Email said someone told her." Brown emailed back to Musacchio "... I will look in her email tomorrow."

43. On or about January 17, 2006, **Musacchio** sent an email to Brown with a subject line "Go hunting." The message indicated that **Musacchio** wanted Brown to look at the email accounts of the Exel president, legal counsel, vice president and another officer. Brown responded that he was heading to dinner, but

that when he got to the apartment he would "... dig deep!"

44. On or about January 17, 2006, Brown made an unauthorized access to the Exel's email server and the account of the Exel president. Brown sent an email to Musacchio with the subject line "Unbelievable email between Jim and Dick.....they are paranoid!" to which he inserted information from an email exchange between the Exel president and Exel legal counsel.

45. On or about January 21, 2006, Brown and Musacchio had email exchanges and discussed the deletion of emails that Musacchio had sent to himself with attachments from "other places," and how emails sent by Musacchio to a person known to the grand jury could be deleted from that person's laptop.

46. On or about January 21, 2006, Musacchio made unauthorized access to Exel's email server and to the email account of Exel's counsel. He then sent an email to Brown which contained information taken from the email account. The information taken from Exel counsel's email to an outside attorney discussed the possibility of phones being compromised at Exel by their "competitors." Musacchio and Brown had an email exchange in which they discussed Exel counsel's email.

47 On January 21, 2006, Musacchio emailed Brown and told him to "delete everything I sent you I am now deleting everything you and I correspond [sic] as soon as I read it."

48. On or about February 3, 2006, Musacchio emailed Brown with the subject line "Levi sent email info to Damman - DELETE AFTER READING."

49. On or about February 23, 2006, Brown made an unauthorized access to Exel's email servers and to the email account of Exel's president. After making the unauthorized access, Brown sent Musacchio information concerning a confidential email between Exel's president and a person known to the grand jury which had been sent by the president on or about February 22,2006 with the subject "RE: Confidential PepsiCo/FritoLay." Musacchio responded to Brown at his email accountatbellsouth.net from Musacchio's email account at TTS.

50. On or about February 23, 2006, Brown made an unauthorized access to Exel's email server and to the email account of Exel's president. After making the unauthorized access, Brown sent information to Musacchio about a confidential email between Exel's president and Exel's vice president which had been sent by the president on or about February 22, 2006 with the subject "RE: Thanks." Musacchio responded to Brown at his email account at bellsouth.net from Musacchio's email account at TTS.

51. On or about February 23, 2006, Brown made an unauthorized access to Exel's email server and to the email account of an Exel employee. After making the unauthorized access, Brown sent information about a confidential email string between Exel's president and another Exel employee via email to Musacchio. Brown used the subject line "Re: Long ..... but good." Musacchio used his email account at TTS, and replied to Brown at Brown's email address at bellsouth.net and included the message "This is a good one! Looks like we are in good shape. Sent From Blackberry Handheld, Please Excuse Typos."

52. On or about February 23, 2006, Brown made an unauthorized access to Exel's email server and to the email account of Exel's president. After making the unauthorized access, Brown sent information from a confidential email which was copied to the president and others known to the grand jury to Musacchio at Musacchio's email account. Brown used the subject line "He sounds pist! [sic]." Musacchio replied from his email account at tts-us.com to Brown at his email account at bellsouth.net with the message "Maybe time to call him?..."

53. On or about February 23, 2006, Brown made an unauthorized access to Exel's email server and to the email account of an Exel employee. After making the unauthorized access, Brown sent information from a confidential email between Exel's president and another person known to the grand jury to Musacchio. The content of the Exel president's email discussed the loss of an account for American Suzuki, and the president's email had the subject line "Re: American Suzuki." Musacchio used his email account at TTS and replied to Brown via email at his bellsouth.net account with the statement "Well, now they know ...."

54. On or about February 23, 2006, Brown made an unauthorized access to Exel's email server and to the account of Exel's president. After making the unauthorized access, Brown sent information obtained from a confidential email between Exel's president and a person known to the grand jury to Musacchio. The president's email had a subject line "Key People," and contained a discussion about offering incentives to prevent losing key personnel. Musacchio used his

TTS email account to reply to Brown at his bellsouth.net account with the message: "Throw more money after something we are not after!... "

55. On or about February 24, 2006, Brown made an unauthorized access to Exel's email servers and to the account of Exel's vice president. After making the unauthorized access, Brown sent information he had obtained from a confidential email in the Exel vice president's email account to Musacchio via email. The confidential email between the vice president and another person known to the grand jury had been sent by the vice president with the subject line "Letter going to West Farm." Musacchio replied to Brown at his bellsouth.net account on the same date from his email account at ttsus.com. In an exchange of emails, Musacchio responded to Brown "... We cannot do anything unwise at this time."

56. On or about February 25, 2006, Brown made an unauthorized access to Exel's email servers and obtained information from an email that Exel's president and another Exel employee had received on that date from the vice president. The email to the president contained the subject line "FW· update information on the action items of the day." After making the unauthorized access, Brown sent information from the email to Musacchio with a blank subject line. Musacchio replied to Brown's email account at Brown's bellsouth.net account from his email accountattts-us.com.

57 On or about March 7, 2006, Brown made an unauthorized access to Exel's email servers and to the email account of Legal Counsel for Exel. Brown used his email account at bellsouth.net, and sent in-

formation from the Legal Counsel's email account to Musacchio at his TTS email account. The subject line on the email in the Legal Counsel's email account which Brown accessed was "RE: Personal Computer - Chain of Custody" which described Exel's internal investigation into data breaches at Exel, including the unauthorized destruction of data by Brown and unauthorized removal of equipment by Kelly.

58. On or about March 16, 2006, Brown made unauthorized access to Exel's email servers, after which he sent Musacchio via email information from a confidential internal Exel email. The email that Brown sent Musacchio had the subject line "Remember to completely delete" and the email sensitivity was indicated as "Private."

Brown's email was responded to by Musacchio from an email account assigned to him by TTS, and was sent to an email account assigned to Brown by TTS. Musacchio's response was "Well! We are getting into better and better position! Thank you for getting this info."

59. On or about March 17, 2006, Brown made an unauthorized access to Exel's email servers and to the account of Exel's president, and sent Exel proprietary information to Musacchio via email which Brown had obtained from internal emails between Exel's president and a person known to the grand jury. On or about March 18, 2006, Musacchio and Brown exchanged emails with the subject line "Re: Very long but very good information" in which they debated the merits of an email chain between Exel employees which discussed an important Exel client.

60. On or about March 17, 2006, Brown made unauthorized access to Exel's email server and to the account of Exel's president. Brown sent information he obtained from emails between the president and others known to the grand jury to Musacchio from his email account at bellsouth.net with the subject line "Dan is outa there!" Musacchio replied to Brown's email from his email account at TTS.

61. On or about March 24, 2006, in an email string between Musacchio and Brown, Musacchio instructed Brown "if you go fishing, please look for anything about Mitsubishi quotes by someone." Brown replied "I am fishing right now actually. Lisa and Julie disappeared from the meeting and Todd thinks they are over at out office...."

Musacchio responded "They are." Later that day, Brown emailed Musacchio with the subject line "Bad News" and informed him "It appears my fishing hole has dried up ... no more fishing." Musacchio responded "Why?"

All in violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii) (unauthorized access to protected computer)).

Counts 2-3

Unauthorized Access to Protected Computers

(Violation of 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii))

1. The grand jury hereby realleges and incorporates the allegations set out in paragraphs 1- 8 of the Introduction and Count 1 of the Indictment.

2. On or about the dates indicated below, for each count below, in the Dallas Division of the Northern District of Texas and elsewhere, defendant, Michael Musacchio, did knowingly and intentionally access without authorization, and attempted to access without authorization, an Exel protected computer, as defined at 18 U.S.C. § 1030(e)(2)(B), specifically, to intentionally access a computer without authorization, and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii), and as a direct result accessed emails and attached documents contained in the email accounts of Exel officers and employees, as described below:

COUNT	DATE	EXEL EMAIL ACCOUNT(S)
2	11/23-25/2005	Exel email accounts of Exel President and Exel legal counsel
3	01/21/2006	Exel's Legal Counsel

All in violation of 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii).

A TRUE BILL

s/ [illegible signature]

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA

v.

MICHAEL MUSACCHIO

SECOND SUPERSEDING INDICTMENT

18 USC § 371
Conspiracy to Make Unauthorized Access To Protected Computer

A true bill rendered

DALLAS

18 USC §§1030(a)(2)(C); (c)(2)(B)(i) and (iii)
Unauthorized Access to Protected Computers

3 Counts

Filed in open court this __ day of January 2013

Clerk

GOVERNMENT'S AMENDED JURY INSTRUCTIONS, FEB. 1, 2013 [EXCERPTS]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
V	§	CRIMINAL NO.
	§	3:10-CR-00308-P
	§	(ECF)
MICHAEL MUSACCHIO (1)	§	
	§	

GOVERNMENT'S AMENDED JURY
INSTRUCTIONS

The United States of America submits the attached proposed Jury Instructions. Pursuant to Rule 30 of the Fed. R. Crim. P., respectfully requests the Court to include the attached instructions in its charge to the jury, and requests leave to offer such other and additional instructions as may become appropriate during the course of the trial.

The requested jury instructions deal with the essential elements of the crimes charged in the indictment and certain matters of evidence for which the Court might require instructions to the jury. The Government assumes that the Court's charge con-

cerning general matters will be charged by the Court in terms similar to those usually employed by the Court.

* * *

GOVERNMENT REQUESTED INSTRUCTION
NO. 14

CONSPIRACY

Count One of the Second Superseding Indictment charges:

[Please read Count One]

The defendant, MICHAEL MUSACCHIO, is charged with conspiring to commit Unauthorized Access to Protected Computers in Count One of the Second Superseding Indictment. The object of the conspiracy, Unauthorized Access to Protected Computer(s), is charged in Counts Two and Three of the Second Superseding Indictment and I will instruct you about this crime when I instruct you about Counts Two and Three. But for the purposes of the Conspiracy charge, the elements of the crime, Unauthorized Access to Protected Computer(s), are as follows:

First: The defendant, or another member of the conspiracy, intentionally accessed a protected computer(s) without authorization; and

Second: The defendant, or another member of the conspiracy, obtained information from that protected computer(s); and

Third: The conduct involved an interstate or foreign communication; and

Fourth: At least one of the following is also present:

1. The offense was committed for purposes of commercial advantage;

or

2. The offense was committed for purposes of private financial gain; or

3. The value of the information obtained exceeded $5,000.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the defendant guilty of the crime of Conspiracy as charged in Count One of the Second Superseding Indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to commit the crime of Unauthorized Access to Protected Computer(s) as charged in the Second Superseding Indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the Second Superseding Indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the Second Superseding indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which

advances some purpose of a conspiracy, does not thereby become a conspirator.[13]

* * *

[13] Fifth Circuit Criminal Jury Instructions, 2001. § 2.20 [modified].

GOVERNMENT'S SECOND AMENDED JURY INSTRUCTIONS, FEB. 26, 2013 [EXCERPTS]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§
OF AMERICA	§
	§
V.	§ CRIMINAL NO.
	§ 3:10-CR-00308-P
	§ (ECF)
MICHAEL MUSACCHIO (1)	§
	§

GOVERNMENT'S SECOND AMENDED JURY INSTRUCTIONS

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The requested jury instructions deal with the essential elements of the crimes charged in the indictment and certain matters of evidence for which the Court might require instructions to the jury. The Government assumes that the Court's charge con-

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Third: The conduct involved an interstate or foreign communication; and

Fourth: At least one of the following is also present:

1. The offense was committed for purposes of commercial advantage;

or

2. The offense was committed for purposes of private financial gain; or

3. The value of the information obtained exceeded $5,000.

"Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device. (18 U.S.C. § 1030(e)(1)).

"Protected computer" means a computer which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communications or the United States. (18 U.S.C. § 1030(e)(2)(B)).

"Commercial advantage" includes not only monetary gain, but also an advantage over a competitor, including, but not limited to increased revenues, reduced business costs; and retention of customers, agents or employees.

"Financial gain" includes the receipt or expected receipt of anything of value.[13]

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the defendant guilty of the crime of Conspiracy as charged in Count One of the Second Superseding Indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to commit the crime of Unauthorized Access to Protected Computer(s) as charged in the Second Superseding Indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

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One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that

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[13] Title 17 United States Code, Section 101

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The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the Second Superseding indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

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[14] Fifth Circuit Criminal Jury Instructions, 2001, § 2.20 [modified].

TRANSCRIPT VOL. 1, FEB. 19, 2013
[EXCERPTS]

[page 22, lines 18-25]

[THE COURT:]

* * *

The Defendant in this case is Michael Musacchio And I will introduce all the parties to you here in just a few minutes. He is charged in an indictment with one count of conspiracy to make unauthorized access to a protected computer, and with two counts of unauthorized access to a protected computer. The indictment alleges the dates of the offenses as beginning on or about April of 2004 and continuing at least to March of 2006.

* * *

[page 135, lines 8-21]

[THE COURT:]

* * *

First, the Defendant is presumed innocent until proven guilty. The indictment against the Defendant, brought by the Government, is only an accusation and nothing more. After the lunch break you will hear the indictment read. The indictment isn't evidence of guilt. It is an accusation. That is what brings the Defendant here. Don't rely in that in arriving at your verdict. You rely on that in terms of that sets out what the Government has to prove. But we will

include that in the Court's charge to the jury as well. We will set out for you things that we call elements of a crime, and those are the things that the Government has to prove beyond a reasonable doubt. The indictment itself or the fact of an indictment being returned is not any evidence that you should rely on in reaching your verdict in this case.

* * *

[page 141, lines 11 16]

* * *

THE COURT: Ms. Groves, who is reading the indictment?

MR. GREEN: I am, Your Honor.

THE COURT: Mr. Green, you may proceed.

MR. GREEN: May it please the Court.

(Whereupon, the indictment was read in open court.)

* * *

[page 144, line 8 to 153 line 17]

[MS. GROVES:]

* * *

The evidence will show, then, in September of 2005 when Musacchio announced that he was leaving, many of the people that he had cultivated at Exel--Ebinger, Vielhaber, Bowers, Brown--came to him wanting him to take them to his new company, but because of the non-solicitation and non-compete

agreements he told them he couldn't do it. Nonetheless, the evidence will show these individuals believed that that is exactly what Mike Musacchio was going to do, and he was going to set up a new company to compete with Exel and they wanted to be in it.

The evidence will show that these individuals were basically unindicted co-conspirators in this indictment; that they exceeded their authorized access at Exel and provided Musacchio with sensitive Exel business documents to ensure that when the time came that Musacchio could set up his competing business, that they would be included.

Why would they want to be included so badly? The evidence will show that this new competing company that Musacchio was to set up was going to provide the new group of Exel pioneers with an equity interest in the new company. And the new agents who were coming wanted to get an equity interest as well. So there was great interest in these individuals for two reasons. One, they wanted to get a competitive advantage for TTS, which would result in private financial gain to them. The same is true for Musacchio.

So in order to assure this in their future, they went about sending some things that they -- business documents, business records that they knew would be of value to Musacchio in setting up the new company to him; sometimes unsolicited, many times solicited.

These documents did help TTS. The evidence will show that TTS could not have started up nearly as quickly as it did without the benefit of Exel's inside information--Exel's budgets, their revenues, incentive programs, agent retention programs, even forms that Exel used were taken. There were thousands of doc-

uments that were taken from Exel by these individuals, exceeding authorized access, and also, the evidence will show, by the conspirators Roy Brown and Mike Musacchio making unauthorized accesses to Exel's computer systems and taking documents themselves.

Vielhaber was a vice president at Exel, and he was responsible for technology there. The evidence will show that Ebinger was a vice president in the financial aspects of Exel. He would provide business plans, sales and agency data, incentive programs, annual budgets. So would Bowers, who was a vice president at Exel.

Kim Shipp, who was the executive assistant, exceeded her authorized access also. She provided office gossip. She was the executive assistant for Jim Damman. She sat outside his office. She overheard his conversations, and she would email that information to Mike Musacchio.

The evidence will show Roy Brown when he was at Exel before he left he had a lot of responsibilities in the I.T. department. All of these individuals, the evidence will show, knew that they were not to send sensitive Exel business information outside the company without express authorization of the president.

Exel had a code of business conduct. They had a code of business ethics. They had email use policies in effect, and all of those documents, you will hear from a witness, Melissa McDonald in the HR department at Exel, all of those documents were in effect during the time period that is relevant during the indictment, and all of the individuals, both unindicted co-conspirators, Musacchio, Brown, and Kelly, knew

these documents, knew that they were supposed to comply with the restrictions on the use of Exel information that were set out in them.

While Brown was there after Musacchio left, he continued to exceed authorized access to Exel email servers. Brown left in October of 2005. Before Brown left, the evidence will show that Musacchio had gotten the assistance of a former director of Mark VII, Exel's predecessor, a man by the name of Doug List. You will hear from Doug List. He worked with Musacchio to get TTS up and running, to get its business plan going, to get its documents showing its estimates for revenues. These were important to attract investors to start up this company. And List used this information that had been provided by Brown, Vielhaber, Ebinger, Bowers, and that had been provided to Musacchio. He used it after Musacchio sent it to him. And the evidence will show that at some point even List became nervous about all of this bounty of Exel information coming in and cautioned Musacchio.

The evidence will show that Mike Kelly had worked at Exel in an I.T. capacity. He worked under Roy Brown's supervision. After Roy Brown left Exel, Mike Kelly stayed on for a bit longer. He left Exel in November of 2005. By November of 2005, Vielhaber, Shipp, and Brown had already left Exel and gone to work for TTS. TTS started up essentially as a functioning company in the fall of 2005.

After Roy Brown left Exel in October of 2005, the evidence will show that he then began making unauthorized accesses to Exel's computers, and he had taught Musacchio how to make those accesses also. In

fact, emails that you are going to see introduced into evidence in this case showed that Musacchio frequently directed Roy Brown to go fishing, which was a term used to say "Go to the emails; look for something of value." The evidence will show that Musacchio also referred to Roy Brown as 007, because essentially what Brown was doing at Musacchio's direction was spying on Exel.

As previously mentioned, the evidence will show that much of the Exel sensitive documentation was given to Douglas List and also given to Hal Oppenheimer who, at that time, was working with List for finding an investor.

Before TTS was up and running, when they were at the stage of gathering documentation, this new company Musacchio was forming was called Otra Vez. It later became Total Transportation Services.

The evidence will also show the vice president Steve Bowers sent many documents, many important documents to Musacchio by exceeding his authorized access. But he did not get invited to go to TTS, and he remained at Exel until he was terminated.

The evidence will further show that Roy Brown made his unauthorized accesses by using what is called the back door method. Roy Brown had administrator passwords to an Exel email server, an excel server called IXDOM.

The evidence will show that what Brown did was on his home computer he would log into his Bellsouth account. From there he would access the Exel email server, use an admin password to get in, he would scroll through the different email accounts, usually Jim Damman's email account, Richard Merrill the le-

gal counsel's email account, the email accounts for the vice presidents who were in charge of Exel's finances, any email account that Musacchio directed him to go look into, and any email account that he believed would help find information of value that he could pass along to Musacchio for the commercial advantage of TTS and the private financial gain of Musacchio and Brown and others.

The evidence will show that Roy Brown did have his Bellsouth account and he used it for making unauthorized accesses.

The evidence will also show that Musacchio had a Comcast account at his personal residence, and that in early January of 2006 he had a Verizon account at his personal residence.

The evidence will also show that Kim Shipp used a Hotmail account, and that a lot of the information was provided by Kim Shipp to Musacchio through her Hotmail account.

In the time period April 2004 through March 2006, the evidence will show that Brown made thousands of accesses to Exel email servers. Mr. Brown pled guilty. Mr. Brown will testify in this case. He will tell you what he did, what Musacchio did, what they did together to provide that commercial advantage to TTS and to get a private benefit.

At some point the evidence will show that Brown could no longer get into the Exel email servers using the IXDOM password. What he did then was he reached out to Mike Kelly who, at that point in time, no longer worked for Exel. He worked for TTS. You heard a reading of the indictment. You heard a reference to an email where Roy Brown said, "My you

know what to you know where is locked out." The evidence will show that Kelly, knowing that those administrative passwords were the keys to the kingdom of Exel's servers, responded back without question to Roy Brown with administrator passwords for other servers which were used by Brown to make unauthorized access.

Kelly also has pled guilty in this case, and he will testify about what he did. He will also testify about the set-up of Exel servers and also the set-up of Total Transportation Services.

You will also hear testimony from the vice presidents who exceeded their authorized access-- Vielhaber, Ebinger, and Bowers. Now, Mr. Ebinger remained with Exel until January of 2006 and continued during that time -- Remember, the evidence is going to show that Brown, Vielhaber, and Kelly had come over to Total Transportation Services in November of 2005. Ebinger was still there until January of 2006, still getting important financial information to Mike Musacchio for the benefit of Total Transportation Services for its commercial advantage.

When Ebinger came over to TTS in 2006, the evidence will show that Musacchio's coup was completed. They had also managed to get agents to come over, the agents with the big clients. The evidence will show that the Redden Group and the Yates Agency were with TTS by that point in time.

The evidence will show that Exel had attempted to prevent the departure of the agents that were important to their company, but by unauthorized accesses, Total Transportation knew everything that they were doing and were able to meet the demands

of the agents; were able to do something better to keep those agents with Total Transportation Services.

The evidence will show that Mike Musacchio crippled Exel, basically, through his efforts to create a competitor using unfair methods. The evidence will show that he crippled Exel by getting a commercial advantage for Total Transportation Services and by seeking private financial gain for himself and the others who were working with him.

The evidence in this case, the email evidence showing Musacchio's wrongdoing is overwhelming and pervasive. Thousands of sensitive business documents stolen; some stolen by Roy Brown and Musacchio through unauthorized accesses; some stolen by Roy Brown through exceeding unauthorized accesses; some stolen by other individuals at Exel by exceeding unauthorized accesses.

The evidence will show that Total Transportation Services made a very quick start, attracted investors very quickly, and generated tens of millions of dollars in one year while Exel lost millions in that same year.

You will hear the testimony of Exel's president Jim Damman, how he became suspicious, almost like somebody was looking over his shoulder, and how the firm Exel began to investigate whether someone was able to get access to their information. You will hear from Mr. Damman that they did find out that their email accounts had been compromised.

You will also hear from witnesses that Musacchio resigned from Total Transportation Services shortly after it was discovered that there were unauthorized accesses by him. You will also hear that Andy Cole,

who was associated with the Redden Group, became president of Total Transportation Services.

You will hear that Brown was terminated, Kelly was terminated, but some of the vice presidents who came over from Exel, who had exceeded their authorized access, remained with

Total Transportation Services, and remain there even today

The evidence will show from the testimony of Special Agent Allyn Lynd of the FBI that IP addresses of back door hacks were associated with Comcast, Bellsouth, and Verizon

email accounts through January of '06.

You will also hear From Agent Lynd that stolen emails that are set out in the indictment in this case were found on Exel computers, on conspirator home computers, and on Total Transportation systems, where they should not have been.

You will also hear testimony from Special Agent Lynd about attempts on the part of Brown and Musacchio to delete emails which would have indicated what they had actually done in this case.

At the conclusion of the evidence, ladies and gentlemen, the evidence will be overwhelming about what happened in this case. It will be overwhelming about the purpose for the unauthorized accesses and the accesses that exceeded authorization. They were done for the purpose of a competitive advantage of Total Transportation Services, and they were done for the purpose of private financial gain for Musacchio, Brown, and the others.

Thank you very much.

THE COURT: Thank you.

* * *

[page 168, line 12 to 169 line 2]

* * *

[JAMES JAY DAMMAN,

Testified on direct examination by Ms. Groves as follows:]

* * *

Q. At some point in time after it was discovered that there had been security breaches in the Exel email servers, was it discovered who was responsible for that?

A. Yes.

Q. And do you know who that was?

A. Mike Musacchio, Roy Brown.

Q. At any point in time did you learn that other Exel -- former Exel employees had made unauthorized accesses or exceeded -- I am sorry. Exceeded their authorized access to the Exel system and provided copies of proprietary information?

A. Yes.

Q. Do you know who those --

A. Steve Bowers, Kim Shipp, Jeff Vielhaber.

Q. Had Rob Ebinger also done that?

A. Yes.

* * *

TRANSCRIPT VOL. 3, FEB. 21, 2013
[EXCERPTS]

[p. 171-72]

* * *

A. He had asked me about what things I would be working on, and I detailed a list of them.

Q. That is -- What is on the screen right now is that list of things you were going to be working on?

A. Yes, sir.

Q. And did he respond to that list?

A. Yes, sir.

Q. And what was his response?

A. "Thanks. Now the question is, how are we going to get into email after you leave?"

Q. Now, do you know what he is referring to about "getting into email after you leave"?

A. Yes, sir.

Q. What is Musacchio referring to at this point?

A. How we would access the email accounts that I had been accessing while I was there.

Q. And is this right before you leave Exel?

A. Yes, sir.

Q. Was it your understanding that he was referring to his own email?

A. No. He was referring to any email account at Exel.

Q. Now, at this point in time, how long had Musacchio been gone from Exel?

A. Over a year.

Q. And what did you, if anything, what did you respond with?

A. "Not a problem. I have the back-door password that only I know and no one else can change."

Q. Now, when you refer to back door, what are you referring to?

A. There was an administrative account that existed that I had the username and passwords for.

Q. And what would you be able to do with the administrative accounts?

A. You could access anything you wanted to on the Exel server.

Q. And is that what you are referring to in this response?

A. Yes, sir.

Q. And what, if anything, did Mr. Musacchio respond with?

A. "Beauty!"

Q. And did you respond to that?

A. "I started around 5 a.m. My hope is to have it completed and in Dell's hands by 9 a.m."

Q. What is that a reference to, because it doesn't seem to be a response to the last comment?

A. It isn't. I may have read a different email and responded from this one.

Q. Okay. Now, this exchange from when you first started from this point where I am drawing the line, the part where you detail out a bunch of things that you are planning on doing to the point up here with the response "Beauty," how

* * *

[p. 215-17]

* * *

of the email exchanges between you and Mike Musacchio on November 24th and 25th of 2005?

A. Yes, sir.

MR. GREEN: The Government moves for the admission of No. 83.

MR. ETHINGTON: Judge, this is not a conditional exhibit, is it? This is --

THE COURT: Correct. It is not.

MR. ETHINGTON: No objection.

THE COURT: Admitted.

MR. GREEN: May we display No. 83, please?

Q. (BY MR. GREEN) If you look at the first part, the first part of the email which is down the bottom under the green line that I marked -- Do you see that area?

A. Yes, sir.

Q. And is that an email from Musacchio to you?

A. Yes, sir.

Q. What is he saying in that email?

A. "When you get a chance, try to get onto ETS's web mail." Which would be Exel. "Everything was fine last night, but tonight I get an error message that says failed to connect to mail server. I didn't do anything that would lock me out. Maybe the server is down."

Q. Now, is this the first time that you knew that Mike Musacchio was also going into ETS's web mail?

A. No, sir.

Q. And how do you know he was doing it before this time?

A. Because I gave him access to it after I had left Exel.

Q. Did you explain to him how to accomplish getting in?

A. Yes, sir.

Q. And was it -- How long after you left Exel did you have that conversation and provide that access to Musacchio?

A. Almost immediately.

Q. Now, as we continue up this thread, what is your response?

A. "Looks like the server is down. Guess we will have to wait until someone figures that out."

Q. And what did Musacchio say?

A. "Okay. Thanks."

Q. And did you respond to that?

A. Yes.

Q. And what was your response?

A. "It's working now. I restarted it remotely. I guess they have not changed a single password."

Q. And was there a response from Musacchio to that?

A. Yes, sir.

Q. And what was that?

A. "Incredible isn't it?"

Q. And what was your response to that, if anything?

A. "More like ignorant."

Q. Now, when you told Musacchio that "I restarted it remotely," did you restart Exel's server remotely?

A. No, sir.

Q. And do you know how that their server started up; how it got restarted?

A. No, sir.

Q. Why did you tell him that?

A. I was trying to impress him that I still had the ability to keep that up.

Q. Was that important in your relationship that you would want Musacchio to consider you valuable?

A. Absolutely. This became the only thing he ever wanted. It was a daily request. Every single day, "Go look, go look. I need this. I need that."

Q. And were you accommodating him on these requests?

A. Sure I was.

MR. GREEN: May approach, Your Honor?

THE COURT: Yes.

MR. GREEN: Thank you.

Q. (BY MR. GREEN) Sir, I have placed in front of you what has been marked as Government's No. 82. Does this appear to be an email between you and Mike Musacchio on December 27th, 2005?

A. Yes, sir.

Q. And does it appear to be an accurate copy of that email?

* * *

TRANSCRIPT VOL. 7, FEB. 27, 2013
[EXCERPTS]

[page 209, line 16 to page 211, line 18]

* * *

THE COURT: Yes.

All right. Next one?

MS. GROVES: No problem, Judge, with caution on punishment or notes, on or about, or consideration of only the crimes charged, or similar acts. And under general definitions, no problem with that.

With respect to the conspiracy instruction, no problem with that except, Judge, there is a reference to the elements of unauthorized access to a protected computer in the conspiracy charge, and then when you look at the unauthorized access instructions, I think it might be somewhat confusing if they are referring to it and it has specific dates in it. And I just have a suggestion that the reference be "on or about the date charged in the indictment" instead of a specific date in the instruction.

MR. ETHINGTON: What page?

THE COURT: Good point. Page 13.

MS. GROVES: And the same again on page 15.

MR. ETHINGTON: Can you do that again, Linda?

MS. GROVES: In looking at the conspiracy count, if you look at the first element it says -- it references the elements of the crime of making unauthorized access to a protected computer as defined in Counts 2 and 3 on pages 13 and 15. And then you can go to page 13, the first element gives a specific date, and

we are thinking that might be confusing for the conspiracy charge. It would be my preference to have it say "on or about the date charged in the indictment" for Count the and Count 3.

MR. ETHINGTON: So change "November 25th" to just --

MS. GROVES: "On or about the date charged in the indictment."

MR. ETHINGTON: Let's do that.

THE COURT: All right with that?

MR. ETHINGTON: Yes.

MS. GROVES: And that would be the same on page 15.

(Discussion amongst Government counsel out of the hearing of the reporter.)

MS. GROVES: Perhaps it is just better to restate the elements.

MS. HEATH: In Count 1?

MR. GREEN: Yes.

MS. HEATH: I agree.

THE COURT: Yes, that is a problem.

MS. GROVES: I think, Judge, we did that in our requested instruction No. 14. We simply restated the elements from the unauthorized access to protected computer.

THE COURT: Yeah. I was trying to avoid that, but we may not have any choice because of the difference. We will give that some thought and we will make the changes and we will let you all know in the morning how we change that.

Any thoughts, Mr. Ethington, on that?

MR. ETHINGTON: No, I agree. Let's take the confusion out of it.

* * *

TRANSCRIPT VOL. 8, FEB. 28 & MAR. 1, 2013 [EXCERPTS]

[page 52 ,line 23 to page 53, line 6]

* * *

(Whereupon, the jury left the courtroom.)

THE COURT: Other than adding Mr. Kelly to the co-Defendant instruction on page 5 and then the issue on the jury verdict, anything else that is outstanding regarding the charge that we need to address during the break?

MS. GROVES: I don't believe so, Your Honor.

MR. ETHINGTON: No, Your Honor.

THE COURT: We will make those changes and get them back to you here shortly.

* * *

[page 54, line 20 to page 55, line 24]

* * *

(Whereupon, the jury entered the courtroom.)

THE COURT: All right. Members of the jury, I will now read the Court's charge to the jury You don't have to worry about taking notes or remembering everything. We will send a copy of it back with you. You will each have your own copy to work with during your deliberations. We will also get the exhibits back there to you so you can use all of that during your deliberations.

(Whereupon, the Court's charge to the jury was read in open court.)

THE COURT: At this time the lawyers are permitted to address you in closing argument.

On behalf of the Government, Ms. Groves?

MS. GROVES: Thank you, Your Honor. May it please the Court, counsel.

Ladies and gentlemen, it is a privilege to address you at this point in time. On behalf of the Government's team, we appreciate very much the personal sacrifices that people sometimes have to make to fulfill their civic duty and sit on jury, but without you our system of justice just wouldn't work, and we thank you very much.

As you have sat here for almost two weeks now, you have heard some interesting stories, I hope, but let me just first off say what this case is not about. It is not about a good company versus a bad company. It is not about one method of doing business versus another method of doing business. This case is about Michael Musacchio being involved in a conspiracy to make unauthorized access to protected computers. It is also about him doing it himself on two substantive counts that are set out in the indictment.

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[page 58, line 5 to page 59, line 10]

* * *

Once it looked like TTS was up and going, and I believe they had a bank account set up--there are some bank records in evidence that you can look at--that is really probably when they actually started the company started. Maybe they weren't moving freight at that time, but they were a company and they were

in business. And once that was up and running, Mr. Musacchio in September of 2005 left ETS and really started his company.

Now, you have heard a lot about non-compete agreements and non-solicitation agreements. Okay. That is really not about the hacking. That is more about the maneuvering that took place with Exel employees so they could prevent ETS from knowing that Musacchio was going to start up this company and do a brain-drain on their company by employees such as Jeff Vielhaber, Rob Ebinger, Roy Brown, Kim Shipp. All of those people were going to be shifted over to TTS to work with Musacchio and taken away from ETS. And this was going to happen in October, November, and early January of 2006. We have charts in evidence which will show you when people actually left ETS to join TTS.

You did hear from Jim Damman. After Mr. Musacchio left ETS, Jim Damman became the president of ETS. He realized when he came to ETS that there were problems with technology, and they were doing what they could to remedy those. He also realized that they needed to work hard to retain agents. What he didn't realize is that he was going to be practically cyber-stalked by Mr. Musacchio and Roy Brown. He didn't realize that some of the employees at ETS were not loyal to ETS and were going to provide confidential ETS documents to TTS through Mr. Musacchio and Mr. Brown to help that get its quick start-up.

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[page 61, lines 2-23]

* * *

Mr. Merrill and Mr. Damman both spoke to you about what is -- what types of documents were taken by ETS employees by exceeding the authorized access, and whether those documents were documents which would provide a commercial advantage to a competitor. And a number of them were. Some of them you are going to hear about are the 2005 budget plan. And I know Mr. Musacchio and Ms. Shipp said, "That is nothing. That wouldn't benefit anybody." But when you get back in that jury room, take a look at it, because that 2005 budget plan provides information about at-risk agents, who all the agents are, what their annual revenues are. It is the type of information that may not be helpful to Mr. List, because he is the Harvard MBA and he is looking at something different, but it would be very helpful, in the opinion of Mr. Damman and Mr. Merrill and others, if it fell into the hands of a competitor, somebody who is trying to lure away the agents to their company that ETS had that were identified in that document.

There is peer analysis that fell into the hands or was taken -- Actually it was stolen. Let's call it what it is. It was stolen by Brown and Musacchio to help them set up TTS and get it a quick start.

* * *

[page 63, line 20 to page 67, line 3]

* * *

Another witness you heard from was Steve Bowers. Mr. Bowers was a senior vice president at ETS.

He had high hopes of joining Mr. Musacchio at TTS. And he did provide that 2005 budget plan for Exel at Mr. Musacchio's request. He also was an unindicted coconspirator who is not charged by the Government. And Mr. Bowers exceeded his authorized access in providing that to Mr. Musacchio.

Now, when we talk about exceeding authorized access, I need to interject at this point some testimony you heard from the HR person Melissa McDonald. From about 1997 through the time that Mr. Musacchio left ETS, there was an employee handbook which made it very clear that employees aren't supposed to give out confidential information of the business. This is not that unusual. When you go back to the jury room, you are going to be able to take your common sense and rational thought with you. That is not crazy.

In about 2003 there was a code of ethics that was also implemented. And it also said you cannot give out confidential business information of this company. We have to protect it. Employees can't do that.

Now think about this, ladies and gentlemen. While Mr. Musacchio was at ETS, he was the president and CEO, and all the employees of ETS are supposed to abide by the code of ethics, the code of business ethics, but to him, no big deal.

As part of Government's Exhibit No. 11-R, you will see some actual acknowledgment pages and signature pages from employees at ETS such as Roy Brown, Kim Shipp, Jeff Vielhaber, Rob Ebinger, Steve Bowers. They acknowledged that they read it, they understood it, and they would abide by it.

And in addition, all of these codes of conduct and ethics very available by ETS employees on the website. If they had any questions, Ms. McDonald said they could come to HR people or the legal counsel at ETS and they would straighten them out. "Can I disclose this?"

"Well, I don't know. Let's go ask somebody."

So there were resources there for employees such as Mr. Vielhaber, Bowers, and others, to determine if what they were doing was inappropriate.

But they already knew that, didn't they? Because they already knew that Musacchio was going to make a start-up company, and they already knew they wanted to be part of it. So what they were doing was ignoring the responsibility that they had to their company and being disloyal to their company, and providing Musacchio the documents he needed for that quick start-up of TTS.

And you also heard from Mr. Brown. Mr. Brown was over the I.T. department at ETS. He considered Mr. Musacchio a good friend and a mentor, and he really wanted to go with Musacchio to TTS. He started making unauthorized accesses pretty early on. He would use the IXDOM administrative password to access Exel servers. He would use his personal email account to -- Well, he would copy and paste something from the Exel mailbox that he had accessed quite frequently, Jim Damman's, paste it into his personal email account, and send it to Mr. Musacchio frequently at his personal email account. You have also got evidence in the case of those accounts. Roy Brown's was bellsouth.net. Mr. Musacchio's was

Comcast, and later in early January 2006 it became Verizon.

Mr. Brown has pled guilty. He hopes to get a benefit from his testimony in this case, which only comes to him if he testifies truthfully. But early in this case he came forward and wanted to cooperate and tell his story, and he has done that. He has told you that Musacchio was his boss, his mentor, his friend. He wanted to be involved in the TTS company, and he wanted to ingratiate himself to Musacchio by providing all of this information so that he could go to TTS because he wanted that equity interest and he didn't like how he was being treated at ETS.

And he and Musacchio -- Musacchio would request things from Mr. Brown and Mr. Brown would provide them. Musacchio had little key phrases like "go fishing; go hunting." Now, later Mr. Musacchio testified, "Well, that just meant I wanted him to keep his ear to the ground." Roy Brown told you that meant, "Get in those emails. Start looking in Damman, Hadland, Thompson's accounts, Brad Young. Get me information that will help me attract agents, prevent them from retaining agents." Especially information about agents is what he wanted, because "We have got to get TTS up and running, get it strong, and we have got to take these people away from ETS in order to do it."

Now, he is not getting confidential business information from any source other than ETS. ETS was targeted. He knew ETS, and I think you will agree he was not very fond of the management at ETS, some of the people he left behind.

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[page 68, lines 5-13]

* * *

It goes to show that Mr. Musacchio, though, wanted information of all types from ETS. He used different sources of information. It was the employees who were making unauthorized access, it was Roy Brown and himself who were -- Well, the employees were exceeding authorized access, it was himself and Roy Brown who were making unauthorized access, it was employees like Kim Shipp who would listen in to the president's conversations and send an email.

* * *

[page 69, lines 5-14]

* * *

All right. On No. 13, this is an email. Going down to the bottom, we read these from the bottom up, that Jeffrey Vielhaber, who was a vice president at ETS, sent to Mike Musacchio. You may recall that Mr. Vielhaber, according to Musacchio's testimony, was someone -- an employee of ETS that he approached about getting information about technology, and in the course of that meeting Mr. Vielhaber, who also wanted to join TTS, asked if he could be hired on the side to go to check out software called LoadTech. And he had to sign a non-disclosure agreement.

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[page 71, line 1 to page 74, line 6]

* * *

Can we go to No. 17, please?

Looking at the bottom, Roy Brown, look at the date of this. August 23rd, 2005. Roy Brown is still at ETS. He didn't leave until October. So he is still there and he is looking in email accounts and sending information to Musacchio. "I have not updated in a couple of months, but this should help," he says.

Musacchio responds, "Thanks. This will be helpful."

Can you go up, please?

Further up in the email string Musacchio asks Brown, "Can you get some Jim Damman emails?"

And Brown replies, "Yes, possibly, no guarantee. Anything you're looking for specifically?"

Can you look at No. 19, please? Can you go up to the next -- Can we enlarge just the first portion there? Thank you.

The information he had sent was of the agency locations, it was fairly current, August of 2005 information, detailing who their agents were, what their revenues were, if they owed money, their sales, all kinds of things on this, and it was described by Mr. Damman as something that would have commercial advantage to a competitor.

Now could we go to No. 22?

Remember there was a lot of testimony about a possible buyout of ETS by Deutsche Post? Mr. Damman had sent out an email to the members of ETS because it was going to be breaking news and he

was kind of letting them know what was going on. Down at the bottom you see his original email. "Some of you may have already read or heard about the announcement below."

Can we go up further?

Roy Brown sends that to Musacchio. Musacchio responds "This could not be better news." And they are pretty excited about it.

Can we go to the next one, please, No. 25?

At no time in these emails does Musacchio say, "Hey, we shouldn't be doing this. I don't want you sending me anymore emails." It is always, "Great. Get me more. Get me more."

Government's No. 25. This is an email taken, lifted, stolen from one of Jim Damman's emails. The Dan reference there is Dan Avramovich. You will see Jim Damman's original email among the exhibits when you go back. What Roy Brown did was to access that email account, take that information, and send it to Musacchio.

Can you go up a bit, please?

Well, they are pretty proud of themselves.

Can you go up a little bit more?

Let's go on now to No. 29. Government's No. 29 is pretty significant. There was an attachment that Brown sent on to Musacchio. You will see that phantom stock option program was a Damman document, and it will be also in the evidence that you will receive to consider. A phantom stock option program, Mr. Damman explained, was one of their attempts at retaining their agents by giving them--and I am no financier--but it is phantom stock, which is not actual

stock in the company, but it is a financial benefit to them if they were stockholders in the company.

When he sends it to Musacchio, Musacchio says, "You are on fire. Take a look at toad's email and see if he is sucking up to Jim." He is having fun with this, ladies and gentlemen.

Let's go on to No. 33.

And this is a very telling email, I think. Government's No. 33 an offer from Dan to Ken Ledbetter, and supposedly five to six other locations. This is information that Roy Brown got out of the email accounts. He sent it to Mike Musacchio. Mike says, "Well done. You're a master!"

And Brown responds, "I don't know about being a master, but it is apparent that I am becoming an excellent spy!"

And Musacchio calls him 007.

So when Mr. Musacchio said he thought it was okay for Roy Brown to access those email accounts, I want you to remember this. They both knew they had no business in there. Roy Brown is spying and Musacchio knows it. Roy Brown is making unauthorized access and Musacchio knows it, and he is loving it. He is loving the information that he is getting.

Let's go to No. 39.

No. 39. Again, this is part of an email string involving the phantom stock program. Let's start down at the bottom. This is No. 39. Obviously some information from Damman's email account has been -- His account has been hacked in and Roy Brown has copied it and he sent it on to Mike Musacchio.

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[page 119, line 5 to page 120, line 9]

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MS. HEATH: May it please the Court, counsel.

Ladies and gentlemen of the jury, you will be happy to know I am the last attorney you have to listen to before you start your deliberations. I am honored to represent the Government and I am honored to be here to give you the final closing argument.

Michael Musacchio is guilty of conspiring with Roy Brown and Mike Kelly to access without authorization the computer systems of Exel, the email systems; specifically the email boxes, as you have heard, of Damman, Merrill, Thompson, Hadland, Young.

He is guilty of personally accessing without authorization those very same computer systems, those same email boxes, personally. That is Counts 2 and 3.

Count 2, if you look at Exhibit No. 83, 81, 82, those three exhibits show Count 2. It shows Mike Musacchio's conversation with Roy Brown where he has the information and he is sending it to Roy Brown; information that could only come from the email boxes at Exel.

Government's Exhibit No. 107 is Count 3. Again, Mike Musacchio sending information to Roy Brown; information he could only get from accessing the mailboxes at Exel.

Count 1 is a conspiracy. He simply has to agree to engage in conduct--that is, accessing without authorization a computer system at Exel. That agreement you can determine through the conversations, through the emails that you have seen, from the tes-

timony of Brown, through the testimony of Kelly, that they did this for their boss, their current boss, their future boss, and then their current boss again—Mike Musacchio.

* * *

JURY CHARGE AND COMPLETED VERDICT FORM, MAR. 1, 2013

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA,	§	
vs.	§	
	§	No.3:10-CR-308-P
MICHAEL MUSACCHIO (1)	§	
	§	

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the Jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then, I will give you some specific

rules of law about this particular case; and finally, I will explain to you the procedures you should follow in your deliberations.

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened - that is, in reaching your decision as to the facts - it is your sworn duty to follow all the rules of law as I explain them to you.

You have no right to disregard or give special attention to anyone instruction or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors and they have the right to expect nothing less.

PRESUMPTION OF INNOCENCE - BURDEN OF PROOF- REASONABLE DOUBT

The indictment is simply the description of the charge made by the Government against the defendant; it is not evidence of his guilt. The law presumes the defendant innocent. The presumption of innocence means that the defendant starts the trial with a clean slate. In other words, I instruct you that the defendant is presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has

proven him guilty beyond a reasonable doubt. Unless you are satisfied beyond a reasonable doubt that the defendant is guilty, the presumption alone is sufficient to find the defendant not guilty.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

EVIDENCE - EXCLUDING ARGUMENT OF COUNSEL AND COMMENT OF COURT

As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses, the exhibits and stipulated facts. Remember that any statements, objections or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case and, in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

During the trial I sustained objections to certain questions. You must disregard those questions. Do not speculate as to what the witness would have said

if permitted to answer the question or as to the contents of an exhibit. Your verdict must be based solely on the legally admissible evidence and testimony.

Also, do not assume from anything I have done or said during the trial that I have any opinion concerning any of the issues in the case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

EVIDENCE - INFERENCES - DIRECT AND CIRCUMSTANTIAL

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and, you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that the defendant is either guilty or not guilty. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

CREDIBILITY OF WITNESSES

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say and how important that testimony was. In making that decision I suggest that you ask yourself a few questions. Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness.

In making up your mind and reaching a verdict, do not make any decisions simply because there were

more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

ACCOMPLICE - CO-DEFENDANT - PLEA AGREEMENT

In this case the government called Roy Brown and Mike Kelly, co-defendants, as witnesses with whom the government has entered into agreements providing that these codefendants will not be prosecuted for any charges beyond the crime alleged in count one of the indictment and a lesser sentence than they would otherwise face. Such plea bargaining, as it is called, has been approved as lawful and proper, and is expressly provided for in the rules of this court.

A co-defendant, including one who has entered into a plea agreement with the government or who received immunity from prosecution, is not prohibited from testifying. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. You, the jury, must decide whether the witnesses' testimony has been affected by any of those circumstances, or by the witnesses' interest in the outcome of the case, or by prejudice against the defendant, or by the benefits that the witness has received as a result of being immunized from prosecution. You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of a co-defendant unless you believe that testimony beyond a

reasonable doubt. The fact that a co-defendant has entered a plea of guilty to the offense charged is not evidence of the guilt of any other person.

ALLEGED CO-CONSPIRATORS

The government has also called Doug List and Steve Bowers as witnesses. The testimony of an alleged accomplice must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witnesses' testimony has been affected by any of those circumstances, or by the witnesses' interest in the outcome of the case, or by prejudice against the defendant, or by the benefits, if any, that the witnesses have received.

You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict any defendant upon the unsupported testimony of such witnesses unless you believe that testimony beyond a reasonable doubt.

For this reason, you should exercise caution in evaluating their testimony and scrutinize it with great care. You should consider whether they have an interest in the case and whether they have a motive to testify falsely. In other words, ask yourselves whether they have a stake in the outcome of this trial. You may decide not to accept their testimony, or their testimony may be accepted by you. If you believe some or all of such testimony to be true, it is up to you, the jury, to decide what weight to give to the testimony of an alleged accomplice.

CHARACTER EVIDENCE

Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, you may consider such evidence along with all the other evidence in the case.

Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.

Bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

MULTIPLE COUNTS

A separate crime is charged against the defendant in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The fact that you may find the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime.

GUILT BY ASSOCIATION

There is a long-standing rule against "guilt by association." A defendant may not be convicted merely because people who worked for him committed criminal conduct. In this case, Mr. Musacchio cannot be convicted simply because he was associated with or friendly with anyone you may find to have acted in violation of the law. Each element of each offense

must be proved independently on the basis of Mr. Musacchio's conduct and state of mind.

SUMMARIES AND CHARTS RECEIVED IN EVIDENCE

Certain charts and summaries have been received into evidence. Charts and summaries are valid only to the extent that they accurately reflect the underlying supporting evidence. You should give them only such weight as you think they deserve.

CAUTION - PUNISHMENT

If the defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

NOTES

Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely upon your own independent recollection of the proceedings and you should not be unduly influenced by the notes of other jurors. You should not share your notes with any other Juror.

Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been. Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

You will note that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

ON OR ABOUT

You will note that the indictment charges that the offenses were committed on or about specific dates. The government does not have to prove that the crimes were committed on those exact dates, so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date reasonably near the dates stated in the indictment.

CAUTION - CONSIDER ONLY THE CRIMES CHARGED

You are asked to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of each crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

SIMILAR ACTS

You have heard evidence of acts of the defendant which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine:

Whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment; or

Whether the defendant had a motive or the opportunity to commit the acts charged in the indictment; or

whether the defendant acted according to a plan or in preparation for commission of a crime; or

whether the defendant committed the acts for which he is on trial by accident or mistake.

These are the limited purposes for which any evidence of other similar acts may be considered.

GENERAL DEFINITIONS

The word "knowingly" as that term has been used from time to time in these instructions. means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "intentionally", as that term is used from time to time in these instructions means to act purposely, with the conscious desire to cause the result of the conduct.

The term "interstate commerce" means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia.

COUNT 1-18 U.S.C. § 371

***Conspiracy to Make Unauthorized Access to Protected Computer* (conspiracy to violate 18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i) and (iii)(unauthorized access)**

Count 1 of the indictment charges the defendant with conspiring to violate Title 18 U.S.C. § 1030(a)(2)(C), unauthorized access to protected computer(s), in violation of 18 U.S.C. § 371. Title 18 U.S.C., § 371, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States. Title 18 U.S.C. § 1030(a)(2)(C) makes it a crime for a person to intentionally access a protected computer without authorization and exceed authorized access, and thereby obtain information, and (1) the offense was committed for purposes of commercial advantages or (2) private financial gain, or (3) the value of the information exceeded $5,000.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to commit the crime of unauthorized access to a protected computer in violation of 18 U.S.C. § 1030(a)(2)(C) as defined above.

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy **knowingly** committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which

advances some purpose of a conspiracy, does not thereby become a conspirator.

COUNT 2 – VIOLATION OF 18 U.S.C. §§ 1030(a)(2)(C)

Unauthorized Access to Protected Computers

Count 2 of the indictment charges the defendant with making or attempting to make unauthorized access to Protected Computers in violation of 18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i) and (iii). For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: On or about November 23-25, 2005 the defendant intentionally accessed, or attempted to access, a protected computer(s) without authorization; and

Second: The defendant obtained information from a protected computer(s); and

Third: The conduct involved an interstate or foreign communication; and

Fourth: At least one of the following is also proven beyond a reasonable doubt:

1. The offense was committed for purposes of commercial advantage;

or

2. The offense was committed for purposes of private financial gain; or

3. The value of the information obtained exceeded $5,000.

For you to find the defendant guilty of attempting to commit Unauthorized Access to Protected Comput-

er(s), you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant intended to commit Unauthorized Access to Protected Computer(s); and

Second: That the defendant did an act constituting a substantial step towards the commission of that crime which strongly corroborates the defendant's criminal intent

A computer means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

A protected computer means a computer which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communications of the United States.

A commercial advantage includes not only monetary gain, but also an advantage over a competitor.

A financial gain includes the receipt or expected receipt of anything of value.

To find that a defendant acted for purposes of commercial advantage or private financial gain, you need not find that the defendant actually achieved

that aim, but only that the defendant acted for those purposes.

COUNT 3 – VIOLATION OF 18 U.S.C. §§ 1030(a)(2)(C)

Unauthorized Access to Protected Computers

Count 3 of the indictment charges the defendant with making or attempting to make unauthorized access to Protected Computers in violation of 18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i) and (iii). For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: On or about January 21, 2006, the defendant intentionally accessed, or attempted to access, a protected computer(s) without authorization; and

Second: The defendant obtained information from a protected computer(s); and

Third: The conduct involved an interstate or foreign communication; and

Fourth: At least one of the following is also proven beyond a reasonable doubt:

1. The offense was committed for purposes of commercial advantage;

or

2. The offense was committed for purposes of private financial gain; or

3. The value of the information obtained exceeded $5,000.

For you to find the defendant guilty of attempting to commit Unauthorized Access to Protected Comput-

er(s), you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant intended to commit Unauthorized Access to Protected Computer(s); and

Second: That the defendant did an act constituting a substantial step towards the commission of that crime which strongly corroborates the defendant's criminal intent

The definitions of "protected computer," "commercial advantage," and "financial gain" for this count are the same as those definitions listed for Count 2.

To find that a defendant acted for purposes of commercial advantage or private financial gain, you need not find that the defendant actually achieved that aim, but only that the defendant acted for those purposes.

UNANIMITY OF THEORY

You will be instructed that your verdict, whether it is guilty or not guilty, must be unanimous. The following instruction applies to the unanimity requirement as to each count of the indictment.

The indictment alleges that the crimes of Unauthorized Access to Protected Computer(s) and Conspiracy to commit Unauthorized Access to Protected Computer(s) were committed in three different ways. When I instructed you on the elements of the crime of Unauthorized Access to Protected Computer(s), the Fourth element described three ways of committing that offense. The first is that the defendant committed the offense for purposes of commercial advantage.

The second is that the defendant committed the offense for purposes of private financial gain. The third is that the value of the information obtained exceeded $5,000.

The government does not have to prove that the offenses were committed in all of these ways for you to return a guilty verdict on these charges. Proof beyond a reasonable doubt on any one is enough. You could find that the government has proven more than one of them. But in order to return a guilty verdict, all twelve of you must agree that at least one has been proved. All of you must agree that the government proved beyond a reasonable doubt that the defendant committed the offense for purposes of commercial advantage; or, all of you must agree that the government proved beyond a reasonable doubt that the defendant committed the offense for purposes of private financial gain; or all of you must agree that the government proved beyond a reasonable doubt that value of the information obtained exceeded $5,000.

LESSER INCLUDED OFFENSE

In some cases a defendant is charged with breaking a law that actually covers two separate crimes. A "lesser included offense" is a crime that isn't as serious as the other crime a defendant is charged with.

If you find the Defendant not guilty of the crimes charged in Counts 1, 2, and 3, you must determine whether the Defendant is guilty of the lesser included offense.

Proof of the lesser included offense requires proof beyond a reasonable doubt of the facts necessary to prove the crime charged in Counts numbered 1,2, and 3 as explained on pages 12-15, except the offense was

not committed for purposes of commercial advantage or private financial gain, or the value of the information obtained did not exceed $5,000.

MISTAKE OF FACT

The Defendant has raised as a defense that his mistake that authorization existed to access the information, or that the accessing the information did not exceed authorization shows that he did not have the intent required to be guilty of the offense of Unauthorized Access to Protected Computers. It is the government's burden to prove beyond a reasonable doubt that the defendant had the intent required for the offense of Unauthorized Access to Protected Computers. If, after considering all the evidence in this case, you have a reasonable doubt about whether the defendant had the intent required for Unauthorized Access of Protected Computer(s), because of the defendant's mistake or for any other reason, you must find the defendant not guilty of that offense.

DUTY TO DELIBERATE - VERDICT FORM

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to

the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges--judges of the facts. Your duty is to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A form of verdict has been prepared for your convenience.

The foreperson will write the unanimous answer of the jury in the space provided for each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the marshal. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

SIGNED this [28th] day of February, 2013.

s/JORGE A. SOLIS

s/JORGE A. SOLIS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA,	§	
vs.	§	CASE
	§	No.3:10-CR-308-P
MICHAEL MUSACCHIO (1)	§	
	§	

JURY VERDICT FORM

MEMBERS OF THE JURY:

COUNT 1:

We, the jury, find the Defendant Michael Musacchio:

(X) GUILTY of the offense charged or

( ) NOT GUILTY.

Consider the lesser included offense only if your verdict above is not guilty:

( ) GUILTY of the lesser included offense or

( ) NOT GUILTY

COUNT 2:

We, the jury, find the Defendant Michael Musacchio:

(X) GUILTY of the offense charged or

( ) NOT GUILTY.

Consider the lesser included offense only if your verdict above is not guilty:

( ) GUILTY of the lesser included offense or

( ) NOT GUILTY

COUNT 3:

We, the jury, find the Defendant Michael Musacchio:

(X) GUILTY of the offense charged or

( ) NOT GUILTY.

Consider the lesser included offense only if your verdict above is not guilty:

( ) GUILTY of the lesser included offense or

( ) NOT GUILTY

VERDICT CERTIFICATION

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

s/ [Illegible]	[March 1, 2013]
FOREPERSON	DATE

SENTENCING TRANSCRIPT PART 2, SEPT. 5, 2013 [EXCERPTS]

* * *

[page 115, line 4 to page 116, line 5]

MS. GROVES: And that is what is so difficult to determine in these cases. That is why there is really only one case charging anything similar to what we have in the Musacchio case, and that is the *Batti* case. And the *Batti* case there were only 21 days of unauthorized access involved in that. In this case we are talking about a two-year period. We are talking about two individuals making unauthorized access and a third individual providing the back-door administrative passwords. So this is a much larger case than *Batti* was.

THE COURT: Now, are you limiting your unauthorized access -- are you conflating that with also exceeding authorized access? When we went to trial we charged the jury only on unauthorized access, and that is a shorter period of time.

MS. GROVES: It is a shorter period of time. It has to take place, it has to start after Mr. Musacchio has left Exel.

THE COURT: Okay.

MS. GROVES: And the Court is absolutely correct on that point. It is very easy for me to conflate them, having dealt with this case for so long. One of the objects of the conspiracy, of course, was exceeding authorized access, but the Government did not submit it in that form to the jury.

THE COURT: Right. The jury only received the unauthorized access.

* * *

Supreme Court, U.S.
FILED
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No. 14-1095

In The
Supreme Court of the United States

MICHAEL MUSACCHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment?

2. Whether a statute-of-limitations bar not raised at or before trial is reviewable on appeal?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Michael Musacchio was the defendant in the district court and the appellant in the Fifth Circuit.

Roy Brown and Michael Kelly were co-defendants in the district court under the original Indictment. They pled guilty prior to trial and were not parties to the appeal in the Fifth Circuit.

Respondent the United States of America prosecuted the case in the district court and was the appellee in the Fifth Circuit.

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In The
Supreme Court of the United States

NO. 14-1095

MICHAEL MUSACCHIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The judgment of conviction and sentence of the District Court for the Northern District of Texas can be found at Petition Appendix B1-B12. The transcript of the court's oral denial of a motion for a new trial can be found at Petition Appendix D1-D2.

The opinion of the Fifth Circuit affirming the district court's judgment is unpublished but available at 590 Fed. Appx. 359, 2014 U.S. App. LEXIS 21358, and can be found at Petition Appendix A1-A16.

JURISDICTION

The Fifth Circuit issued its opinion on November 10, 2014. The Fifth Circuit denied rehearing and rehearing *en banc* on December 9, 2014. Pet. App. C1-C2. The petition for a writ of certiorari was filed on March 9, 2015, and granted on June 29, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 3231.

STATUTES INVOLVED

18 U.S.C. § 1030, entitled "Fraud and Related Activity in connection with computers," provides, in relevant part:

> (a) Whoever— * * *
>
> (2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains— * * *
>
> (C) information from any protected computer; * * *
>
> shall be punished as provided in subsection (c) of this section.
>
> * * *
>
> (c) The punishment for an offense under subsection (a) or (b) of this section is— * * *
>
> (2) (A) except as provided in subparagraph (B), a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to

commit an offense punishable under this subparagraph;

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or an attempt to commit an offense punishable under this subparagraph, if--

(i) the offense was committed for purposes of commercial advantage or private financial gain;

(ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or

(iii) the value of the information obtained exceeds $ 5,000; and

(C) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; * * *

18 U.S.C. § 371, the general conspiracy statute, provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and

> one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 3282(a), the general limitations statute, provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT

1. Both questions presented in this case address the consequences of a failure to raise an issue at or before trial. The first question asks to what extent the government is bound by heightened burdens in jury instructions to which it did not object. The courts of appeals agree that, as a general rule, such instructions bind the government as the law of the case when evaluating the sufficiency of the evidence. The courts of appeals diverge, however, over whether there is an exception to the general rule where the error in the jury instruction is clear or "plain" but the indictment itself is correct. The sole issue for this Court is whether the general rule measuring the sufficiency of the evidence against the charge as given to the jury without government objection is subject to such an exception.

The second question asks whether the failure of a defendant's trial lawyer to raise a statute-of-

limitations bar constitutes waiver precluding consideration of the issue under any standard of review on appeal. Three circuits hold that the limitations bar may be reviewed for plain error or otherwise. Seven circuits, including the Fifth Circuit below, hold that the bar is waived and unreviewable.

The government would resolve both of those questions against defendants: imposing on defendants the draconian consequence of complete waiver for failure to raise a statute-of-limitations bar, but allowing prosecutors to escape the law-of-the-case consequences of their failure to object to an unfavorable jury charge. Such a pro-government/anti-citizen approach not only is inconsistent with a proper construction of the law on the relevant issues, it also is diametrically opposed to our deep-seated interests in checking government power – particularly the dangerous power to deprive citizens of their liberty. Those interests and principles of lenity do indeed favor an asymmetrical treatment of failures to object, but it is an asymmetry in favor of defendants and of limiting government power, not the reverse.

2. The questions presented by this case arise in connection with a prosecution for conspiring to make, and making, unauthorized access to a protected computer. Such alleged access occurred in the course of business competition between two companies.

Prior to 2004, Petitioner Musacchio was the president of Exel Transportation Services ("Exel" or "ETS"), a transportation brokerage company that arranges freight shipments for business clients. Pet. App. A1. Musacchio resigned from ETS on September 9, 2004, and in November 2005 (after expiration

of his non-compete agreement) founded a competing company. Two ETS employees – original co-defendants Roy Brown and Michael Kelly – later joined Petitioner at his new company.

As the two companies competed for sales agents, ETS became suspicious about certain information Petitioner and his new company seemed to possess regarding ETS and eventually concluded that Petitioner and others must have obtained that information from ETS emails.

3. On November 2, 2010, the United States indicted Petitioner, Brown, and Kelly for accessing and conspiring to access the protected computers of their former employer, ETS, in violation of 18 U.S.C. § 1030(a)(2)(C). JA 46-79. That statute provides criminal penalties for anyone who "intentionally accesses a computer without authorization *or* exceeds authorized access, and thereby obtains— * * * information from any protected computer" (emphasis added). What is most relevant for present purposes is that the statute provides for two discrete means of committing the crime: either (1) accessing a computer "without authorization" or (2) "exceed[ing] authorized access" to a computer. *See LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1133 (9th Cir. 2009) (noting the differences between unauthorized access and exceeding authorized access, and interpreting statute to give effect to both phrases); Pet. App. A5-A6 (recognizing distinct and disjunctive means of violating statute).

In the initial Indictment, the government charged the three defendants with conspiring to engage in, and engaging in, *both* types of computer access.

JA 49 (Count 1: "Conspiracy To Make Unauthorized Access to Protected Computer and to Exceed Authorized Access to Protected Computer"); JA 68-69 (Counts 2-22: charging "Exceeding Authorized Access to Protected Computers" against defendants Brown and Kelly); JA 70 (Counts 23-24: charging "Unauthorized Access to Protected Computers" against Petitioner Musacchio). The Indictment repeatedly alleged that various co-conspirators *exceeded* authorized access under the government's broad theory of that crime. *See, e.g.*, JA 50-51 (alleging Petitioner "directed unindicted coconspirators * * * to exceed any authorized access to Exel's protected computers"); JA 53, 56, 60 (multiple allegations that Brown "exceeded his authorized access"; alleging unindicted co-conspirator sent Musacchio proprietary information from Exel).

After defendants Brown and Kelly pled guilty, however, the government filed a Superseding Indictment on September 6, 2012, and a Second Superseding Indictment on January 8, 2013. JA 80-84; JA 89-114.[1] The superseding indictments altered the charges against Petitioner in a number of ways. For Count 1, the charge was ostensibly narrowed to "Conspiracy To Make Unauthorized Access to Protected Computer," dropping the conspiracy to "Exceed Authorized Access." *Compare* JA 49 *with* JA 92; *see also* Pet. App. A2-A3. Despite having removed references to "exceed[ing] authorized access" from the charges

---

[1] The Superseding Indictment and Second Superseding Indictment are not materially different from each other for purposes of the issues before this Court.

specified, the government kept in the superseding indictments various allegations relating to that distinct crime and to a conspiracy that included exceeding authorized access as its object. *See, e.g.*, JA 81-82, 92-99, 102-03.

For Count 2, the alleged date of Petitioner's unauthorized access was expanded from one day to three days, and the protected computer allegedly accessed was changed from "Exel Server" to "Exel email accounts of Exel President and Exel legal counsel." *Compare* JA 71 *with* JA 112. By so expanding and altering the acts alleged for Count 2, the government brought into play an unknown number of additional alleged unauthorized accesses and thus expanded the scope of the charges against Petitioner.

The final charges against Petitioner consisted of one count of conspiracy to make unauthorized access (Count 1) and two substantive counts of making unauthorized access (Counts 2 and 3).

On their faces, the superseding indictments of September 6, 2012 and January 8, 2013 were filed roughly seven years after the November 23 through 25, 2005 acts alleged as the basis for Count 2. JA 84, 112.

4. At trial the government sought to show that various alleged co-conspirators accessed ETS computers both while still employed there and after they had left, and provided Petitioner with confidential information. In doing so, the government comingled its purported evidence of external (without authorized) access to ETS computers with its purported evidence of internal (exceeds authorized) access to ETS computers by persons within the company who then sent company information to Petitioner. Pet. App. A3; JA

127-34 (opening statement describing upcoming evidence); 135 (direct examination); JA 146-49, 151-53 (closing argument discussing evidence).

5. At the close of the trial, and without objection from the government, the district court instructed the jury regarding the conspiracy count that:

> Title 18 U.S.C. § 1030(a)(2)(C) makes it a crime for a person to intentionally access a protected computer *without authorization* **and** *exceed authorized access*, and thereby obtain information * * *
>
> For you to find the defendant guilty of this crime, you must be convinced that the government has proved * * *
>
> First: That the defendant and at least one other person made an agreement to commit the crime of unauthorized access to a protected computer in violation of 18 U.S.C. § 1030(a)(2)(C) *as defined above.*

JA 168 (emphasis added); Pet. App. A3.

Having defined the two alternative methods for committing the underlying crime in the conjunctive, this instruction made *both* access without authorization *and* exceeding authorized access required elements of the crime and hence of the conspiracy to commit that crime.

Beyond that conjunctive instruction, however, the court did not define either type of access for the jury, drew no distinction between "exceed[ing] authorized access" and "access[ing] a computer without authorization," gave no guidance on what proof might be required for each, and gave no instruction regarding

the need for unanimity as to each and both of those crimes. *See* JA 173-74 (requiring unanimity as to discrete punishment factors but not as to discrete types of illegal access). As a practical matter, the charge conveyed those discrete forms of prohibited access ("without authorization" and "exceeds authorized access") as if they were a single crime of unauthorized access without alerting the jury to the differences between the two or, indeed, whether they were even two discrete concepts at all.

6. The government did not object to the court's conjunctive definition of the crime and, in fact, argued in its closing that Petitioner and his alleged coconspirators had also "exceeded" authorized access – a crime the government specifically removed from the formal charge in the superseding indictments. *See* JA 147-52. Indeed, the government drew little distinction between its examples of access without authorization and exceeding authorized access and made no argument that the jury needed to find a conspiracy to commit both types of access.

7. On March 1, 2013, the jury returned a general verdict of guilty on all counts. JA 178-79.

8. Following the verdict, Petitioner moved for a new trial or an acquittal, arguing, *inter alia*, that the jury charge required the government to prove an agreement *both* to engage in access without authorization and to exceed authorized access, that there was insufficient evidence to establish the latter, and that the unanimity-of-theory instruction did not address those two elements. Motion for a New Trial, Mar. 15, 2013 [Dkt. 170]; Supplemental Motion for Judgment of Acquittal, Aug. 29, 2013 [Dkt. 199]; Se-

cond Supplement to Motion for Acquittal, Nov. 19, 2013 [Dkt. 221].

9. The district court orally rejected the motion for a new trial, Pet. App. D2, made no express ruling on the supplemental motion for acquittal, and, on November 19, 2013, entered judgment against Petitioner sentencing him to sixty months imprisonment on Counts 1 and 2 concurrently, and three consecutive months on Count 3. Pet. App. B1-B3.

10. Petitioner timely appealed to the Fifth Circuit, arguing, *inter alia*, that the conjunctive jury instruction for Count 1 was the law of the case and binding on the government, and that there was insufficient evidence as a matter of law to establish the "exceeds authorized access" crime. Pet. App. A5. The primary argument regarding the sufficiency of the evidence for "exceeds authorized access" turned on how that element should be interpreted. The circuits are split regarding whether it is the "access" to the information itself that must exceed authorization or whether the mere *misuse* of information obtained through authorized access will satisfy the "exceeds" requirement. *Compare United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (*en banc*) (narrow view of "exceeds authorized access" language excluding subsequent misuse of materials *accessed* within authority; noting disagreement among the circuits), *with United States v. John*, 597 F.3d 263, 271 (5th Cir. 2010) (broad view that "exceed[ing] authorized access" "may encompass limits placed on *the use* of information obtained by permitted access to a computer system") (emphasis in original). The evidence in this

case would not satisfy the narrower construction of the statute.

Petitioner also argued, given the mixed allegations and arguments regarding access without authorization and exceeding authorized access, and the lack of a unanimity instruction on those separate elements, that there was no way to know whether the jury was unanimous as to *both* elements or whether different jurors may have reached their conclusion based on different theories. *See* Pet. App. A7-A8; Brief of Appellant at 20-23, 27-28.

Finally, Petitioner raised, for the first time on appeal, a statute-of-limitations bar, arguing that Count 2 was based on events occurring more than five years before the superseding indictments were filed. *See* 18 U.S.C. § 3282(a) (5-year limitation period); JA 80, 89 (September 6, 2012 and January 8, 2013 filing dates); JA 84, 112 (November 23-25, 2005 alleged access dates). Petitioner further argued that the government was not entitled to claim that the superseding indictments related back to the initial Indictment because Count 2 of the Superseding Indictment significantly altered the charges against him, expanding their chronological scope three-fold and altering the description of what Petitioner allegedly accessed on those dates. Pet. App. A8-A9; Brief of Appellant at 48-50.

11. On November 10, 2014, the Fifth Circuit affirmed Petitioner's conviction and sentence. Pet. App. A1.

Regarding the law-of-the-case/sufficiency-of-the-evidence challenge to Count 1, the court of appeals reviewed the issue *de novo*. It acknowledged the er-

ror in the jury charge: that the district court "incorrectly instructed the jury that it had to find that Musacchio had agreed to make unauthorized access *and* exceed authorized access." Pet. App. A5 (emphasis in original). And it acknowledged that the government had not objected to the instruction. *Id.*

The court recognized the general rule that " '[a]n instruction that increases the government's burden and to which the government does not object becomes the law of the case.' " Pet. App. A5-A6 (citation omitted). However, the court of appeals held that the law-of-the-case "rule does not apply where (1) 'the jury instruction * * * is patently erroneous and (2) the issue is not misstated in the indictment.' " *Id.* (quoting *United States v. Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), *cert. denied*, 546 U.S. 1115 (2006)).

Finding that the jury instruction was obviously in error, the court held that the so-called *Guevara* exception to the law-of-the-case doctrine applied. Pet. App. A6-A7. The majority opinion did not reach whether the evidence was sufficient to demonstrate an agreement to exceed authorized access, and did not address the circuit split bearing upon that issue. *See supra* at 11.

Regarding Petitioner's statute-of-limitations argument that the superseding indictments came more than five years after the events charged in Count 2, the court held that because it was not raised in the district court it was waived. Pet. App. A8 (citing *United States v. Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (per curiam), *cert. denied*, 503 U.S. 908 (1992)).

Judge Haynes concurred in the judgment, but declined to join the court's reasoning as to the law-of-

the-case exception. She instead would have concluded that there was sufficient evidence for "both prongs ('exceeds authorized use' and 'unauthorized access') and, therefore would not reach the issue." Pet. App. A16. In order to reach that conclusion, she relied upon *John*, 597 F.3d at 270-73, in which the Fifth Circuit had articulated a broad view of "exceeds authorized access," contrary to the narrower view adopted by the Ninth Circuit and others. *See supra* at 11.

12. On December 9, 2014, the Fifth Circuit denied Petitioner's petition for rehearing *en banc*. Pet. App. C1-C2.

13. Petitioner began serving his sentence on February 11, 2015. JA 24-25.

SUMMARY OF ARGUMENT

1. When a jury charge setting forth the elements of a crime erroneously imposes, without objection, additional or stricter burdens on the government than required by the underlying statute, the generally accepted rule is that those elements become the law of the case, binding on the government at later stages of the proceeding. Such additional or stricter elements thus set the baseline for measuring the sufficiency of the evidence for any subsequent verdict to convict.

The exception applied by the court of appeals, refusing to follow the law-of-the case doctrine where the instructional error is plain and the heightened burden is not replicated in the indictment, is unwarranted and inconsistent with the broadly accepted general rule. The doctrine, by its nature, applies only in cas-

es of error, and its rationale does not change based on the magnitude of the error involved. While other versions of the law-of-the-case doctrine are more lenient where an objection was made but erroneously rejected by a court, where a criminal jury has relied on the more stringent description of the law without government objection, there is no justification for allowing the government to avoid the consequences of its choices.

Enforcing the law-of-the-case doctrine, regardless of the plainness of the error, is more consistent with the asymmetrical roles of the government and the accused, with our system's broad concern with checking the government's dangerous power to deprive persons of their liberty, and with the uniformly accepted application of the doctrine where a less-than-plain error imposes extra-statutory burdens or where the indictment itself assumes even clearly erroneous extra burdens.

That the unobjected-to error is contained in the jury charge and is more obvious only strengthens the case for applying the doctrine. The elements as described in the jury charge are more likely to have synergistic effects on the arguments to, and deliberations by, the jury than the elements in the indictment, and later ignoring an instructed element deemed erroneous is more likely to be prejudicial. The inherent uncertainty created by adding an element to the jury's deliberations, but then ignoring that element during subsequent review, supports the doctrine's prophylactic rule requiring adherence to the elements in the jury charge as given. Likewise, the government has less of an excuse for acquiescing

in a "plain" error than in a debatable one. That the government's acquiescence in such error might ultimately preclude it from imposing punishment on a defendant is not at all unjust, it instead is consistent with the many checks we place on the government's exercise of a great and dangerous power.

Nor do the due-process underpinnings of review for sufficiency of the evidence limit the application of the law of the case at such later stage in the proceedings. Any effect the law-of-the-case doctrine has on those later proceedings is merely a *consequence* of how the law is defined to the jury. But the reasons for sufficiency review are not required predicates for the law-of-the-case doctrine. Many legal rules will have a consequence for sufficiency review – excluding relevant but prejudicial or illegally obtained evidence, for example – but do not depend upon the rationale of sufficiency review to give them force. Furthermore, the due-process concerns with ensuring that the evidence could support a jury rationally finding, beyond a reasonable doubt, the elements charged in the *indictment* (including erroneous extra-statutory elements) apply as much if not more to reviewing whether such evidence could support a rational finding of the elements the jury was in fact *instructed* to consider. That a jury lacking sufficient evidence to convict was necessarily irrational in applying the instructions it was given is not saved by the suggestion that they could have rationally reached their conclusion under different instructions.

2. The mere failure to raise a statute-of-limitations bar before or during trial does not irre-

trievably waive such bar so as to preclude consideration of the issue on appeal.

Despite broad resistance to the idea in the courts of appeals, the statute of limitations contained in 18 U.S.C. § 3282(a) is a jurisdictional limit on the government's power to prosecute, try, and punish persons for non-capital offenses. The various factors identified in this Court's cases distinguishing between jurisdictional rules and claims-processing rules strongly support a jurisdictional view of § 3282(a). The wording of the provision reflects an express and definitive prohibition on untimely action, not merely a scheduling request. That wording is more definitive than other filing time limits this Court has found to be jurisdictional. The provision also was enacted by Congress and is applicable to Article III courts, factors whose absence this Court has considered in other cases finding a rule to be non-jurisdictional. Additionally, the background principles applicable to criminal statutes of limitations all favor a strict construction of such statutes against the government. Because the limitations bar in § 3282(a) is properly viewed as jurisdictional, it cannot be waived.

Attempts to characterize the limitations bar as a waivable affirmative defense based on archaic cases discussing anachronistic pleading rules do not supersede, or alter the result from, this Court's current jurisprudence distinguishing jurisdictional and claims-processing rules. Those cases arose in a very different era and context, did not consider the jurisdictional question, and the pleading rules they apply have been abolished. And apart from any formal characterization of the limitations period, the wording and

function of § 3282(a), this Court's current case law, and the weighty policy concerns supporting statutes of limitations all support treating the limitations bar as non-waivable.

Even if the limitations bar were indeed waivable, defense counsel's mere failure to raise the issue is not sufficient to establish such waiver. Waiver is the intentional relinquishment of a known right, as opposed to forfeiture, which is the failure to timely assert a right. This Court's requirements for knowing waiver of important rights, and its treatment of government waivers or forfeitures of limitations bars in the habeas context, all support requiring far more than counsel's mere oversight or neglect in order to find an actual waiver precluding consideration of a limitations bar on direct appeal. Absent a knowing and intentional waiver, appellate courts should be free to consider potential limitations bars. At a minimum, such arguments should be reviewed for plain error given that the government's failure to abide by an express congressional prohibition against prosecution, trial, and punishment based on untimely indictments seriously affects the integrity, fairness, and public reputation of judicial proceedings.

Considering and, if necessary, enforcing, even forfeited time-bars, by contrast, furthers a variety of policy interests in checking government and avoiding collateral litigation over potential ineffective assistance of counsel. The public, the courts, and the litigants are thus all better served by appellate consideration of potential limitations bars notwithstanding any oversight in not raising them earlier.

ARGUMENT

I. The Elements of a Crime as Instructed in the Jury Charge, without Government Objection, Are the Binding Law of the Case for which there Must Be Sufficient Evidence.

When the government does not object to a criminal jury charge that is more onerous to the government than required by the relevant statute, it is the generally accepted rule that the more rigorous charge becomes the law of the case. *See, e.g., United States v. Jokel*, 969 F.2d 132, 136 (5th Cir. 1992) ("An instruction that increases the government's burden and to which the government does not object becomes the law of the case"). The jury having considered the case, without government objection, under such more stringent legal requirements, a court subsequently evaluating the sufficiency of the evidence will do so under the same heightened requirements of proof. *See United States v. Ausler*, 395 F.3d 918, 920 (8th Cir.), *cert. denied*, 546 U.S. 861 (2005).[2]

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[2] The government asserts, BIO 8 & n. 3, that this Court's decision in *United States* v. *Wells*, 519 U.S. 482 (1997), "suggests that the law-of-the-case doctrine is best viewed as a prudential measure that appellate courts may, but are not required to, apply depending on the particular context at issue." BIO 9. This Court in *Wells* did not rule on the applicability of a properly raised law-of-the-case argument, but merely that the doctrine, seemingly raised for the first time *after* certiorari was granted, was insufficient to prevent the Court from applying its traditional rule permitting review of a legal issue that had been resolved in the court of appeals. *Wells*, 519 U.S. at 487-88. There is not even a hint in the court of appeals decision that defendants invoked law of the case to foreclose the government from

Unlike other doctrines falling under the broad rubric of "law of the case," this specialized version of the doctrine combines three distinct features: it applies to the legal standards set forth in a (1) jury charge in a (2) criminal case to which (3) the government has not objected. Those three features strengthen and inform the doctrine and undermine any case for creating arbitrary exceptions to its application. [3]

A. The Law-of-the-Case Doctrine and the Conflict Over Whether It Is Subject to a Plain-Error Exception.

As a general rule, virtually every court to consider the issue applies the law-of-the-case doctrine to jury instructions that erroneously increase the government's burden of proof in criminal cases. *See Guevara*, 408 F.3d at 258 (citing *Jokel*, 969 F.2d at 136, for the general law-of-the-case rule); *Ausler*, 395 F.3d at 920 (an erroneous and more stringent jury instruction given without government objection was the law of the case when reviewing defendant's sufficiency challenge); *United States v. Williams*, 376 F.3d 1048,

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deny[illegible]g it as an element. *United States v. Wells*, 63 F.3d 745, 749-51 (8th Cir. 1995), *rev'd*, 519 U.S. 482 (1997). Rather, whether materiality was an element was litigated and decided on the merits and defendants' invocation of that doctrine in this Court was insufficient.

[3] The phrase "law of the case" also is used to describe the respect given prior appellate rulings at subsequent stages of the same case or the strong presumption against revisiting disputed matters already resolved by the same court at an earlier stage of the case. Those variations on the doctrine often present different concerns and generally do not involve the full combination of elements at issue here.

1051 (10th Cir. 2004) (recognizing that "the government [has] the burden of proving each element of a crime as set out in a jury instruction to which it failed to object, even if the unchallenged jury instruction goes beyond the criminal statute's requirements").[4] Neither the government nor the court of appeals in this case disputed the validity of the general rule.[5]

Courts applying the law-of-the-case doctrine to criminal jury instructions reason that the government should not be allowed to revive a position it has abandoned in the trial court and that a court of appeals should not sustain a conviction on a theory that varies from the one on which the jury was instructed. *See Williams*, 376 F.3d at 1051 (purpose of law of the case "is to prevent the government from arguing on appeal a position which it abandoned below"); *United States v. Angiulo*, 897 F.2d 1169, 1196-97 (1st Cir. 1990) ("If we were to treat the instruction otherwise [than as law of the case], * * * we would be sustaining

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[4] *See also, United States v. Staples*, 435 F.3d 860, 866-67 (8th Cir.) (applying law-of-the-case doctrine to erroneously conjunctive instruction treating an alternative element as an additional element), *cert. denied*, 549 U.S. 862 (2006).

[5] A corresponding rule applies where the more stringent legal standard is set forth in the indictment and such heightened standard likewise becomes law of the case. *See, e.g., United States v. Zanghi*, 189 F.3d 71, 79 (1st Cir. 1999) ("The terms of an indictment can raise the bar of proof for the government to a higher level than the bare minimum required by the terms of a criminal statute because the terms of the indictment specify the 'crime charged.' "); *United States v. Taylor*, 933 F.2d 307, 310 (5th Cir. 1991) (specific intent for crime of escape became element of offense, under law of the case, where defendant was indicted for willful escape and jury was instructed on specific intent).

a conviction on appeal on a theory upon which the jury was not instructed below. This we cannot do.").

Requiring sufficient evidence to satisfy the elements contained in the jury charge as given, even where erroneously more burdensome than the statutory elements, also tends to mitigate the risks inherent in having the court and jury apply different legal standards. Such risks include: jury consideration of extraneous and potentially prejudicial additional conduct or crimes; confusion regarding the interplay between original and added elements; use of the broader conduct added by the instructions to satisfy burdens of proof for the more limited conduct actually charged as a crime; and, where disjunctive alternate crimes are charged conjunctively as if a single crime, the potential for lack of unanimity regarding whether one, the other, or both crimes were proven.[6]

Despite the uniform acceptance and sound reasons supporting the general law-of-the-case doctrine, the First and Fifth Circuits refuse to apply the rule when

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[6] In this case, for example, although Count 1 only charged a conspiracy to access a computer "without authorization," and Counts 2 and 3 only alleged access without authorization on four specific days, the government offered and argued numerous instances of conduct it characterized as co-conspirators "exceeding authorized access." *See* JA 127-34, 135, 146-53. Even though Petitioner was no longer indicted for a conspiracy to exceed authorized access, because the jury charge combined those separate crimes under the rubric of "unauthorized" access, the jury may well have considered such uncharged "bad acts" as proof of the narrower crime actually charged. Measuring the sufficiency of the government's evidence against the added element in the jury charge may not cure all such problems, but it certainly mitigates the risk, present in this case, that the jury relied on the added element without sufficient evidence to do so.

a more stringent jury instruction is "patently incorrect" and the indictment states the correct and more lenient legal standard. *United States v. Zanghi*, 189 F.3d 71, 79-80 (1st Cir. 1999), *cert. denied*, 528 U.S. 1097 (2000); *Guevara*, 408 F.3d at 258 ("erroneous jury instruction increasing the government's burden "may not become law of the case if both (1) it is patently erroneous and (2) the issue is not misstated in the indictment."). Neither court offers much explanation for adopting such an exception.

The Eight Circuit has taken a somewhat different approach, rejecting both a strict application of the law-of-the-case doctrine and "the relatively government-friendly" exception applied in the First and Fifth Circuits. *United States v. Johnson*, 652 F.3d 918, 922-23 (8th Cir. 2011) (first applying law-of-the-case to measure sufficiency of the evidence for an erroneously *substituted* element and then, if the government fails, providing it an opportunity, under a "rigorous standard of review" to try to establish, as to the mistakenly *omitted* element, that " 'the evidence is so overwhelming or incontrovertible that there is no reasonable doubt that any rational jury would have found that the government proved the statutory element.' ") (citation omitted); *United States v. Inman*, 558 F.3d 742, 748 (8th Cir.) (looking to justification for sufficiency-of-the-evidence review to question application of law-of-the-case doctrine), *cert. denied*, 558 U.S. 916 (2009).

Inman addressed the combined errors of added and omitted elements, but reached a distinctly peculiar result. According to *Inman*, a conviction will be upheld if the government shows sufficient evidence to

satisfy the erroneously substituted element, and will also be upheld if, though lacking sufficient evidence for the substituted element, the government can show that the evidence of the omitted element not even considered by the jury was such that any rational jury would have found such element beyond a reasonable doubt. 558 F.3d at 749. That result effectively and erroneously applies the law-of-the-case doctrine *against* the defendant to allow the government satisfy a non-element *instead of* an actual, but omitted, element, applying harmless error standards only if the government fails sufficiency review on the substituted element.

Neither the plain-error exception of the First and Fifth Circuits, nor the more complicated approach of the Eighth Circuit are warranted.

B. The "Plainness" of Error in a Jury-Instruction Does Not Support a Law-of-the-Case Exception.

The "plain error" exception advocated by the government and applied by the court of appeals below makes little sense in light of the well-accepted general rule and the purposes behind that rule. In every application of the law-of-the-case doctrine it is accepted, or at least assumed, that the jury instruction was erroneous and imposed extra-statutory burdens on the government. (If the instruction were correct, there would be no need for the doctrine at all.) The critical fact is not the *existence* of error, but the government's lack of objection to, and hence acceptance of, the erroneous additional burden. The plainness or

debatability of the error simply has nothing to do with the matter.

This Court has held that the plainness and even egregiousness of an error in adding an extra-statutory element to a crime is of no moment for purposes of the Double Jeopardy Clause where an acquittal was based on such plain error. *See Evans v. Michigan*, -- U.S. --, 133 S. Ct. 1069, 1073-74, 1075 (2013) (enforcing double jeopardy consequences of erroneous acquittal based on unproven "element" not actually required by statute, regardless whether it was " 'based upon an egregiously erroneous foundation,' "; recognizing that there was "no question the trial court's ruling was wrong" and "predicated upon a clear misunderstanding" of the law) (citation omitted). So too here, *any* application of the law-of-the-case doctrine necessarily attaches significance to an erroneous articulation of law. The plainness of such error does not affect its essential character as an unobjected-to error that nonetheless binds the government.

The government defends a plain-error exception by pointing to a similar exception in cases applying other versions of the law-of-the-case doctrine. BIO at 10 (*citing Pepper v. United States*, 562 U.S. 476, 506 (2011), *Agostini v. Felton*, 521 U.S. 203, 236 (1997), and *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)). *In Arizona*, for example, this Court recognized a commonly applied exception to certain applications of the law-of-the-case doctrine where a court is "convinced that [a prior ruling] is clearly erroneous and would work a manifest injustice." 460 U.S. at

618 n. 8. Those cases do not support a similar exception here.

First, such cases are quite different from this case, applying a different version of the law-of-the-case doctrine. In *Agostini*, for example, this Court declined to apply the law-of-the-case doctrine to sustain an injunction against sending public school teachers into parochial schools to help educate disadvantaged children. The injunction was entered years earlier on Establishment Clause grounds, but this Court had since overruled the previously controlling precedent. 521 U.S. at 236. Applying the law of the case where the constitutional basis for the injunction had evaporated and the State's fully preserved objection was ultimately vindicated is not even remotely comparable to the circumstances in this case.

Similarly, while this Court in *Arizona v. California* noted an exception for a "clearly erroneous" ruling that "would work a manifest injustice," it cited civil cases with preserved objections and ultimately declined to apply the exception to the original-jurisdiction case before it. *See* 460 U.S. at 618 n. 8.

Pepper, by contrast, was a criminal case, but addressed the impact of a sentencing determination that was indeed disputed and which had been vacated by the court of appeals and remanded for *de novo* resentencing. 562 U.S. at 506-07. The court of appeals having wiped the slate clean of the earlier sentence, it hardly stood as law of the case on remand for resentencing. Again, that case has no bearing on the very different version of the law-of-the-case doctrine at issue here.

Unlike the more common situation in cases where there *was* an objection by the party challenging the law of the case, here the government made no objection and hence it is irrelevant whether the error is debatable or obvious. The primary waiver concerns and change-of-position concerns apply with equal strength regardless whether an error is plain or debatable.

Second, given the uniform acceptance of the law-of-the-case doctrine to bind the government where the jury-charge error is something less than "plain," or is mirrored in the indictment, the objection to a "plainly" erroneous extra element lacks substance. If the error is indeed obvious, the government should have objected. The plainness of an error resolving a *contested* question in other applications of law of the case matters primarily because it stands as a strong indictment of the trial court's initial decision to reject arguments pointing out that error, helping to overcome finality concerns.

In the criminal context, plain-error review is typically invoked by defendants, not the government. The plainness of an error that prejudices a defendant matters because of concerns with improperly convicting or punishing the accused, the integrity of the courts, and because the government's role as an *adversary* is tempered by its duty to do justice rather than take any advantage that comes its way. None of those concerns exist when the roles are reversed and, if anything, some of them continue to weigh in favor of the accused. When applying the law of the case against the government, therefore, the plainness of the error makes it all the *more* compelling to enforce

its consequences because it stands as an even stronger indictment of the government's failure to object in the first place. Insofar as the government acknowledges that it is bound by its acquiescence to error on a close question, it has no credible argument for not being bound by its acquiescence to what it claims is an obvious error.[7]

Third, the government's claim, BIO at 10, that an obvious mistake can be corrected because "no prejudice would result to the defendant" ignores that it would be the government's burden to demonstrate lack of prejudice. *Cf.* FED. R. CRIM. P. 52(a) (harmless error test); *United States v. Olano*, 507 U.S. 725, 741 (1993) (noting opposite burdens of proof regarding prejudice for harmless error versus plain error under Rule 52(a) and (b)). While it would ordinarily be a defendant's burden to prove prejudice from erroneous jury instructions, Petitioner is *not* arguing before this Court that the instructions were erroneous; he is trying to enforce those instructions and hold the government to the natural and legal consequences of those instructions. It is instead the government that argues that *ignoring* one of the elements charged to the jury should be allowed because of plain error and alleged lack of prejudice.

The effect of an additional element on the handling of the case or on jury deliberations may often be diffi-

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[7] The manner in which courts treat extra-statutory elements included in an indictment as binding regardless of the degree of error is instructive. Had the indictment itself added an additional element not required by the statute, the Fifth and Fifth Circuit exceptions to the law of the case doctrine would be inapplicable. *See supra* at 21 n. 5, 23.

cult to prove one way or the other. There are a variety of risks from such additional elements, and from trying to ignore them after the jury has considered them in its deliberations. *See supra* at 21-22. While a defendant might have a difficult time proving prejudice from such risks, the government would have an equally if not more difficult time proving the absence of prejudice.

In this case, for example, the inclusion of "exceed[ing] authorized access" as an issue impacted the proceedings from beginning to end, and it would be far from harmless simply to ignore it as a now inconvenient hurdle to upholding the conviction. It allowed the government to suggest a legally distinct additional type of wrongdoing and bring in arguments and evidence to that effect. *See* JA 127 (prosecution's opening statement) ("The evidence will show that [various ETS employees] were basically unindicted co-conspirators in this indictment; that they exceeded their authorized access at Exel and provided Musacchio with sensitive Exel business documents"); *id.* (arguing that insider ETS employees sent defendant "thousands of documents that were taken from Exel by these individuals, exceeding authorized access" and they did so to provide "a competitive advantage for TTS, which would result in private financial gain to them").

Having spent so much time arguing a conspiracy with an object of exceeding authorized access, it is implausible for the government now to suggest that such arguments had no impact on the case and hence the added element need not have been proven with sufficient evidence. If the government can instead be

excused from having to prove that added alleged illegality with sufficient evidence, then it is no different than the government being allowed to introduce evidence and arguments regarding any number of uncharged and unproven crimes.

Furthermore, because the government routinely comingled evidence and arguments concerning the two types of "access," it cannot now demonstrate that the jury likewise did not treat them as interchangeable. Petitioner suggested as much on appeal when challenging the lack of a unanimity charge and arguing that there was no way to tell if the jury was unanimous as to each of the legally separate, but functionally undistinguished, elements of access without authorization and exceeding authorized access. *Supra* at 11. The Fifth Circuit rejected that argument, in part because defendant had not made that objection below and hence faced the difficult hurdle of plain-error review. Pet. App. A7.

In such circumstances, the shift in the burden of proof is significant because it places the risk of uncertainty squarely on the government. Concerns that may have been insufficient to *meet* the burden of proof for prejudice likely will be more than sufficient to *prevent* the government from establishing a lack of prejudice. *Olano*, 507 U.S. at 742-43 (Kennedy, J., concurring) (noting significance of shifts in burdens of proof where under harmless-error analysis, it would be "difficult for the Government to show the absence of prejudice, which would be required to avoid reversal of the conviction under Rule 52(a)," but under plain-error analysis "[d]efendants seeking reversal

under Rule 52(b) are also likely to experience these difficulties in proving prejudice").

Finally, even assuming that the plainness of an error was relevant to applying the law-of-the-case doctrine to more stringent jury instructions, a claim that such error resulted in "manifest injustice," *Arizona v. California*, 460 U.S. at 618 n. 8, lacks credibility when invoked by the government in a criminal case.

While enforcing the law of the case might result in manifest injustice in other contexts – for example where it would lead to the wrongful *conviction* of a defendant – enforcing the consequences of government action or inaction that potentially checks its ability to deprive a citizen of his or her liberty can rarely, if ever, be deemed manifestly unjust. While the government has the *power* to take away a citizen's freedom by force, our history and Constitution have not viewed that power as tantamount to a "right." Rather, that power is viewed as a dangerous, though admittedly necessary, evil to be vigilantly and suspiciously cabined by a plethora of direct and prophylactic means.

Accused citizens are given the benefit of the doubt whenever uncertainty exists or competing values are implicated. *United States v. Santos*, 553 U.S. 507, 514-15 (2008) (plurality opinion) (rule of lenity); *Smith v. United States*, 360 U.S. 1, 9 (1959) (noting "traditional canon of construction which calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved"). The government is routinely precluded from prosecuting, trying, or punishing citizens regardless whether, in a Platonic world of perfect information

and judgment, they have broken the law. The exclusion of evidence from illegal searches, application of the Double Jeopardy Clause, and application of the statute of limitations are but a few obvious examples. Those outcomes are not viewed as "unjust," much less "manifestly" so. Rather, they are viewed as an acceptable, if occasionally troubling, cost of keeping government in check.

Forcing the government "to turn square corners," *United States v. Jimenez Recio*, 537 U.S. 270, 279 (2003) (Stevens, J., concurring in part and dissenting in part), and holding it to the consequences of its choices and even its mistakes, may hamper the exercise of its power to punish, but in the criminal-law context that is not manifestly unjust. Even were the plain-error exception to the law-of-the-case doctrine theoretically applicable, therefore, it cannot properly be satisfied for the benefit of prosecutors.

C. The Rationale for Reviewing the Sufficiency of the Evidence Does Not Support a Law-of-the-Case Exception.

The government also defends the decision below by claiming that sufficiency-of-the-evidence review only applies to ensure that "the defendant's guilt has been established by 'proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is *charged*,' " in accordance with due process requirements. BIO at 6-7 (citing *In re Winship*, 397 U.S. 358, 364 (1970), and *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)) (emphasis added); *see also*, *Inman*, 558 F.3d at 748 (same). Accordingly it claims that such review need not be conducted on uncharged

elements that are not part of the statutory definition of the crime. The government's argument both misses the point and is incorrect on its own terms.

First, shifting the focus to the *consequences* of an instruction becoming the law of the case, and away from the government's acceptance of the heightened burdens and the jury's deliberations according to such instructions, ignores the point of the law-of-the-case doctrine. That doctrine does not claim constitutional magnitude itself, but rather is an estoppel of sorts, serving purposes in support of the adversary system, the jury system, and providing a check on prosecutorial power. Those purposes may also have due process implications, but they are separate from, and in addition to, the reasons for requiring sufficiency-of-the-evidence review. That the law of the case, once established, will set a baseline for a variety of subsequent legal determinations is simply a consequence of so defining, correctly or not, the applicable law. *See, e.g., Evans*, -- U.S. at --, 133 S. Ct. at 1075-76, 1078 (erroneous reliance on extra-statutory element to acquit for insufficient evidence triggers Double Jeopardy Clause notwithstanding "clear" error in including such element). The enforcement of many types of rules will have a *consequence* bearing on sufficiency-of-the-evidence analysis. The exclusion of evidence for prejudice or Fourth Amendment reasons plainly impacts the sufficiency analysis, but does not depend upon the justifications for sufficiency analysis. So too here.

Second, by emphasizing review of the elements of the crime "charged" in the indictment, rather than as "charged" to the jury, the government draws an arti-

ficial line that makes little sense. Due-process concerns are not limited to the sufficiency of the evidence for elements of the crime as charged in the *indictment* rather than as "charged" to the jury. Indeed, erroneous elements in an indictment are no more a reflection of the elements required by Congress than are erroneous elements in a jury charge, yet they still become law of the case and establish a baseline to measure of the sufficiency of the evidence.[8] Accordingly, the requirements of the underlying *statute* cannot be said to be the critical touchstone of due process when looking at the sufficiency of the evidence.

And if the due process concern is in providing some minimum assurance that the jury applied the beyond-a-reasonable-doubt standard, *Jackson*, 443 U.S. at 316, it is irrelevant whether the extra element they considered was in the indictment or in the jury instructions. For example, the standard of review for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the

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[8] Curiously, the indictment in this case *charged* unauthorized access, but repeatedly *alleged* unauthorized access and exceeds in the conjunctive. JA 92-94. Due to a quirk of law that allows the government to indict in the conjunctive, but try and submit the case to the jury in the disjunctive, the indictment was not deemed erroneous and did not itself trigger the law of the case. *See United States v. Pigrum*, 922 F.2d 249, 253 (5th Cir. 1991). It is only due to that disconnect between how an indictment is read and how jury instructions are read that the government can even invoke the *Guevara* exception. That simply demonstrates that the exception is predicated on artificial line-drawing between the indictment and the jury instructions.

essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. A finding of insufficient evidence to support the verdict thus implies that the jury in question could not have been acting as a "rational" trier of fact or else was mislead as to what they should have been doing, which are among the risks against which such a rule guards. Where the relevant inquiry is whether a jury could have *rationally* reached the conclusion it did, then the far more relevant touchstone is what the jury was instructed to do, not how it might interpret the indictment.

An extra-statutory element added in an indictment has no greater effect on the jury's deliberations than do the jury instructions adding such an element. Indeed, it has less of an impact. Juries are instructed that the indictment is not evidence and that the jury instructions will guide them. JA 158. Although the indictment is among the first things a jury may hear, the instructions are the last guidance the jury receives and will have the most impact on how counsel for both sides argue the case in closing. Due process concerns that support sufficiency of the evidence review when an element is added to the indictment more forcefully support such review when the element is added to the jury instructions.[9]

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[9] That courts uniformly apply the law-of-the-case doctrine when an added element is understandably erroneous, though not "plainly" so, likewise contradicts the government's due process analysis. Understandable errors still do not alter the underlying statute or the indictment, yet they are binding even in the First and Fifth Circuits.

D. The Law-of-the-Case Doctrine Plays a Valuable Role in Checking the Government and Serving the Interests of Lenity and Liberty.

Applying the law-of-the-case doctrine without exception in criminal cases when jury instructions add an element is a better rule because it simply holds the government to such burdens as it has assumed when seeking to exercise the weighty power of criminal prosecution. While our Constitution recognizes and seeks to check the tremendous danger involved in the government's power to prosecute and incarcerate its citizens, there are now numerous means by which defendants can forfeit potentially valid claims through procedural default at multiple stages in criminal proceedings. Holding the government to this limited instance of having to comply with additional burdens that it assumed without objection not only tends to maintain the proper balance in the procedural rules, it best comports with the Constitution's repeated concern with checking the government's power to take away a person's liberty. If defendants may be required to avoid and survive a host of procedural hurdles in defending their liberty, surely the government should be required to meet such burdens as it has assumed or acquiesced in when not objecting to a jury instruction setting a higher bar than the statute or indictment. *Cf. Jimenez Recio*, 537 U.S. at 279 (Stevens, J., concurring in part and dissenting in

part) ("The prosecutor, like the defendant, should be required to turn square corners.").[10]

II. A Statute-of-Limitations Bar Not Raised at or Before Trial Is Reviewable on Appeal.

The general federal limitations statute limits the authority of both the Executive and Judicial branches by providing that:

> Except as otherwise expressly provided by law, *no person shall be prosecuted, tried, or punished* for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282(a) (emphasis added).

On its face, the statute is not merely a procedural requirement for commencing a criminal prosecution, but instead is a substantive *limit* on the government's power to prosecute, try, or punish a person for non-capital offenses if the indictment is untimely.

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[10] If this Court agrees that the law-of-the-case doctrine applies, it would need to vacate and remand with instructions to consider the sufficiency of the evidence for the "exceeds" element. Given Judge Haynes's concurring view that there was sufficient evidence of exceeding authorized access, based on her taking sides in a fully briefed circuit split regarding the interpretation of that provision, Pet. App. A16; *supra* at 11, this Court could potentially find this case returning for yet another split. Should this Court be so inclined, it might seek supplemental briefing on that issue in order to provide some guidance. *See* Pet. 20-21 n. 5 (noting the contingent issue).

Whether that substantive limit is also a jurisdictional limit that cannot be waived is a subject of debate among the courts of appeals. The more pertinent and encompassing question for this case, however, is whether such limits, jurisdictional or not, can be waived by a defendant *inadvertently*, rather than only knowingly and intentionally, or not at all.

On appeal, Petitioner sought to raise a statute-of-limitations bar to Count 2 that had not been raised at trial. Pet. App. A8-A9. He argued that the acts alleged took place nearly seven years before the Superseding Indictment was filed and that the government could not claim the Superseding Indictment related back to the original Indictment because it had materially altered the charge in Count 2. Accordingly, Count 2 was barred by the applicable five-year limitations period. Brief of Appellant at 48-50; 18 U.S.C. § 3282(a).

The Fifth Circuit declined to reach the merits, holding that "a limitations defense is waived if, as here, it was not raised at trial." App. A8 (citing *Arky*, 938 F.2d at 582). Other courts similarly hold that a limitations defense not raised before or during trial is deemed waived on appeal. *United States v. Franco-Santiago*, 681 F.3d 1, 12 (1st Cir. 2012) (citing, though not following, cases on waiver).

Three courts, however, take a different view. One circuit simply permits the issue to be raised for the first time on appeal absent an "explicit waiver." *United States v. Crossley*, 224 F.3d 847, 858 (6th Cir. 2000) ("absent an explicit waiver, the statute of limitations presents a bar to prosecution that may be raised for the first time on appeal").

Two circuits, the First and Seventh, allow review for plain-error. *Franco-Santiago*, 681 F.3d at 13 ("Because he did not raise his statute of limitations defense at trial, we review for plain error") (citing *Olano*, 507 U.S. at 731-32, and FED. R. CRIM. P. 52(b)); *United States v. Baldwin*, 414 F.3d 791, 795 & n.2 (7th Cir. 2005) ("In this circuit, statute of limitations arguments not timely raised in the district court are considered forfeited, not waived, and are accorded plain-error review."), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007).

A. The Federal Statute of Limitations Is a Substantive and Jurisdictional Constraint on Government Action.

The federal statute of limitations is an express restraint on the power of the Executive and the courts to prosecute, try, and punish people for certain past acts more than five years after such acts. The statute is no mere administrative tool for keeping dockets moving, but rather imposes a substantive limit on the power of government and a corresponding substantive right "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *see also Benes v. United States*, 276 F.2d 99, 108-09 (6th Cir. 1960) ("the purpose of statutes of limitations [in criminal actions] is to afford immunity from punishment * * * and that such statutes are construed, in contradistinction to statutes applicable to civil actions, not as statutes of repose going to the remedy

only, but as creating a bar to the right of prosecution.") (citations omitted).

Various courts over the years have held that not only is the statute of limitations substantive, it is also jurisdictional and thus cannot be waived. In *Benes*, for example, the Sixth Circuit held that "an indictment, found after the expiration of the time for beginning prosecution, is barred by the statute of limitations and is not waived by" agreement or other conduct of the accused. 276 F.2d at 109; *see also Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964) (the statute of limitations "is plainly a limitation upon the power to prosecute or to punish. It is, therefore, jurisdictional, and noticeable" when raised for the first time on appeal).

Since those cases, the jurisdictional view of the statute of limitations has fallen out of favor among the circuits. *See Arky*, 938 F.2d at 581-82 (noting rejection of jurisdictional view). Even the early adopters have retreated from the jurisdictional view. *See Crossley*, 224 F.3d at 858 (construing *Benes* narrowly as applying only "absent an explicit waiver"); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987) (holding that the statute of limitations is an affirmative defense that is waived unless raised at trial, without mentioning earlier *Waters* decision)

Despite the broad hostility in the courts of appeals toward the jurisdictional view of statutes of limitations, those courts are mistaken. As with various time limits for noticing a civil appeal or seeking certiorari in this Court, the federal statute of limitations in § 3282(a) is indeed jurisdictional, depriving both prosecutors and the courts of the power to prosecute,

try, and impose punishment pursuant to untimely indictments.

In recent years, this Court has frequently considered whether a time limit or other threshold requirement is a jurisdictional rule or a claims-processing rule. In *Bowles v. Russell*, 551 U.S. 205, 209 (2007), for example, this Court held that "the taking of [a civil] appeal within the prescribed time is 'mandatory and jurisdictional.'") (citation omitted and internal quotation marks omitted). *Bowles* relied upon the wording of the time limit, its imposition by statute, and a history of treating such limits as jurisdictional. 551 U.S. at 209-13; *see also id.* at 213 ("the notion of '"subject-matter"' jurisdiction obviously extends to '"classes of cases * * * falling within a court's adjudicatory authority,"' * * * but it is no less 'jurisdictional' when Congress prohibits federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed") (citations omitted).

Cases since *Bowles* also have emphasized the particular language of the time limit at issue, whether that limit applied to review by Article III courts rather than Article I tribunals, the identity of, and solicitude of the statutory scheme toward, the party against whom the limitation would operate, and cannons of construction bearing upon the construction of the time limit. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428, 437-41 (2011) (noting that the statutory scheme in question is "unusually protective" of the veterans against whom the time bar was asserted; distinguishing cases involving "review by Article III courts" from the time limit for "review by an Article I

tribunal"; noting that the " 'solicitude of Congress for veterans is of long standing' " and applying " 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.' ") (citations omitted).

Under the standards of this line of cases, the limitations period in § 3282(a) amply qualifies as jurisdictional.

First, the language of the statute speaks quite definitively and in terms of forbidding prosecutors and courts from exercising their powers if the timing requirements have not been met, and thus addresses a "court's adjudicatory capacity." *Henderson*, 562 U.S. at 435. Indeed, the limitations provision of § 3282(a), which expressly *forbids* untimely action by prosecutors and the courts is an even stronger case for jurisdictional status than are the time limits for appeals and petitions for certiorari in civil cases, which use somewhat less forceful language. *See* 28 U.S.C. § 2107(a) ("no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree"); 28 U.S.C. § 2101 ("Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree" subject to extension "for a period not exceeding sixty days."); *cf. Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (" 'if a statute does not specify a consequence for noncompliance with statutory timing provisions,

the federal courts will not in the ordinary course impose their own coercive sanction.' ") (citation omitted).[11]

Second, as in *Bowles*, and unlike in *Henderson*, the limitations period applies to proceedings sought to be brought in Article III courts. Indeed, it expressly prohibits the conduct of a trial and imposition of punishment by Article III courts themselves when the prerequisite of timely indictment is not satisfied.

Third, unlike in *Henderson*, a civil case where there was a statutory scheme and a cannon of construction encouraging construction of the relevant provision in favor of the veterans opposing a jurisdictional characterization of the time limits, 562 U.S. at 439-40, here, the applicable background principles and cannons all lean in favor of a *stronger* limitations bar, not a weaker one. *Toussie*, 397 U.S. at 115 (" 'criminal limitations statutes are "to be liberally interpreted in favor of repose," ' "); *Benes*, 276 F.2d at 108-08 (noting broad construction of criminal as opposed to civil statutes of limitations); *Santos*, 553 U.S. at 514-15 (rule of lenity).

In short, the many factors considered in this Court's current jurisprudence on jurisdictional time limits strongly favor treating § 3282(a) as jurisdictional and amply distinguish it from other timing requirements viewed as mere claims-processing rules.

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[11] That the statute only allows exceptions to its command "as otherwise *expressly* provided by law," § 3282(a) (emphasis added), further negates any suggestion that it can be avoided by implication, judicial doctrines of waiver, or the action or inaction of the accused. None of those involve express provisions of law.

Cases rejecting a jurisdictional view of criminal statutes of limitations have not discussed this line of precedent. Instead, such cases reason that the statute of limitations is an affirmative defense and hence, like other affirmative defenses, is waived if not asserted at trial. *See, e.g., Arky*, 938 F.2d at 581-82 (citing cases).

Such reasoning, however, turns on the predicate that the statute of limitations *is* an affirmative defense rather than a jurisdictional limit, and thus begs the question to some extent. To provide the necessary predicate, therefore, those cases rely on this Court's distant decisions in *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917), and *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872), for the proposition that a limitations bar is an affirmative defense that must be plead by the defendant. *See, e.g., Acevedo-Ramos v. United States*, 961 F.2d 305, 307 (1st Cir. 1992) (quoting *Biddinger* for the proposition that " 'The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases.' "); *see also* BIO at 17 (citing *Biddinger* and *Cook*).

But *Biddinger* and *Cook* are extremely thin reeds upon which to rest such weight.

First, *Biddinger* did not involve the federal statute of limitations, but rather an Illinois statute that was worded quite differently than the statute at issue in this case. That statute provided, in relevant part, that "All indictments for other felonies [including the crimes charged] must be found within three years next after the commission of the crime." 245 U.S. at 131 (bracketed material in original). As a command

for when an indictment must be "found" rather than a prohibition on whether a person can be tried, prosecuted, or punished at all, that statute more readily fits within the more modern view of a claims-processing rule.

Second, *Biddinger* deals only with pleading requirements, rather than issues of waiver and the like.[12] Indeed, the antiquated rationale of the *Biddinger* pleading rule – that the limitations period was not an integral part of the definition of the crime and hence failure to plead compliance is not properly raised on demurrer – has been superseded by FEDERAL RULE OF CRIMINAL PROCEDURE 12(a), eliminating such pleading niceties. *Biddinger* thus has no logical precedence over this Court's modern holdings on when a statute is jurisdictional.

Third, *Cook*, the rather cryptic case on which *Biddinger* itself relied, addresses similarly anachronistic pleading questions regarding the effect of a demurrer. The government itself has recognized that case to be "'an old, abstruse' opinion written in 1872." *Del Percio*, 657 F. Supp. at 858 (noting government's characterization of *Cook*). *Cook*'s primary concern

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[12] As one judge has noted, *Biddinger* was driven largely by other concerns. *See United States v. Del Percio*, 657 F. Supp. 849, 859 (W.D. Mich. 1987) ("The central issue in *Biddinger* was not the effect of making a federal statute of limitations a non-waivable jurisdictional bar. Rather, the overriding concern was how to interpret Article IV, Section 2 of the Constitution, so as to preserve state sovereignty while ensuring that state constitutions requiring that people be tried in the county or district in which they allegedly committed a crime, not become shields for guilty individuals seeking to immunize themselves by moving from state to state."), *rev'd*, 870 F.2d 1090 (6th Cir. 1989).

was ensuring that prosecutors had an opportunity to respond to a limitations argument by introducing rebuttal evidence or showing a potential exception to a facially applicable limitations bar. *See* 84 U.S. (17 Wall.) at 178-80; *United States v. Harris*, 133 F. Supp. 796, 798-99 (W.D. Mo. 1955) (distinguishing cases finding the statute of limitations to be an affirmative defense as "all rest[ing] on the principle announced in [*Cook*] * * *, that the prosecution must be allowed an opportunity, in meeting the defense of limitations, to show the existence of some exception to the rule").

Furthermore, the reasoning in *Cook* – that the limitations bar was not an integral part of the definition of the offense, 84 U.S. (17 Wall.) at 177-78 – while perhaps relevant to outdated pleading requirements, is squarely incompatible with this Court's recognition that jurisdictional limits need not be contained in the same statutory section at all, much less incorporated into the enacting clause. *See Barnhart*, 537 U.S. at 159 n. 6 ("The accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants").

Ultimately, the sole basis for courts finding the statute of limitations to be waivable – that it is an affirmative defense – thus cannot be supported by the anachronistic cases on which it rests. Far more relevant are this Court's more recent cases distinguishing between jurisdictional rules and claims processing rules; which support a jurisdictional view of § 3282(a).

Finally, even if this Court were ultimately skeptical of a *jurisdictional* characterization of § 3282(a), it

could easily find that the provision is of sufficient importance to the administration of justice that it should be deemed non-waivable as a practical matter. As Justice Thomas observed in *Gonzalez v. United States*, "[i]n limited circumstances, we have 'agreed to correct, at least on direct review, violations of a statutory provision that embodies a strong policy concerning the proper administration of judicial business even though the defect was not raised in a timely manner.'" 553 U.S. at 270 (Thomas, J., dissenting), (quoting *Nguyen* v. *United States*, 539 U.S. 69, 78 (2003) (internal quotation marks omitted)).

This Court in *Nguyen* held that a non-Article III judge sitting by designation on an appellate panel reviewing a criminal conviction violated the federal statute concerning the composition of such panels. 539 U.S. at 80. Even though petitioners raised their objection for the first time in their petitions for certiorari, this Court reviewed the issue not merely for plain error, but *de novo*. *Id.* at 73-74, 80-81. In fact, this court explained that

> to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld. Even if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel.

Id. at 80-81 (emphasis in original).

Like the statute at issue in *Nguyen*, which "embodie[d] weighty congressional policy concerning the proper organization of the federal courts," *id.* at 79, the statute of limitations in § 3282(a) embodies weighty congressional policy concerning the checks and limits on the power of the Executive and the courts to prosecute, try and punish crimes. Surely such direct and substantive checks on government power are as weighty as the important, but indirect, checks on power and abuse embodied in the statute at issue in *Nguyen*.

B. Failure to Raise a Limitations Bar Is Not a Knowing and Voluntary Waiver.

Even if the statute of limitations is viewed as non-jurisdictional and potentially waivable, the question then becomes *how* can it be waived? "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (1993) (citation omitted).

The mere failure, through inadvertence or neglect, to raise an argument at or before trial is not an intentional relinquishment of a known right. Courts applying the waiver rationale, however, do so even where there is no evidence of intentional or knowing waiver. Indeed, the court of appeals in this case makes no claim that the purported waiver here was knowing and intentional. Pet. App. A8-A9. In such cases the most that can be said is that the argument was forfeited, rather than waived.

This Court has considered issues concerning the *government's* waiver or forfeiture of statute-of-limitations arguments in the context of federal time limits for bringing a habeas petition. *Wood v. Milyard*, -- U.S. --, 132 S. Ct. 1826, 1835 (2012); *Day* v.*McDonough*, 547 U.S. 198, 202 (2006).

In *Wood*, this Court expressly distinguished between forfeiture and waiver and held that if the government merely forfeits, through inadvertence or otherwise, a limitations argument, both the district court and the appellate court may still consider such limitations and dismiss a habeas petition as untimely. -- U.S. at --, 132 S. Ct. at 1830 ("Our precedent establishes that a court may consider a statute of limitations or other threshold bar the State failed to raise in answering a habeas petition."). Noting that the State's "decision not to contest the timeliness of Wood's petition" was a knowing, deliberate and intentional choice, the court held it had waived the limitations issue and hence that issue could not be considered thereafter. *Id.* at , 132 S. Ct. at 1834-35 But this Court expressly distinguished its decision in *Day*, where the failure to raise a limitations issue resulted from "from an 'inadvertent error,'" and thus was reviewable despite forfeiture. *Id.* at --, 132 S. Ct. at 1835 (quoting *Day*, 547 U.S. at 211); *see also id.* at --, 132 S. Ct. at 1832 n. 4 ("We note here the distinction between defenses that are 'waived' and those that are 'forfeited.' * * * "That distinction is key to our decision in Wood's case.").

Although *Wood* and *Day* both involved habeas petitions, they necessarily control the issue here as well. On virtually every possible measure, this

Court's reasoning for a allowing review of a limitations argument merely forfeited, rather than intentionally waived, is *stronger* as applied to the criminal statute of limitations in § 3282(a) than it is for the habeas statute of limitations.

First, a habeas proceeding is civil rather than criminal, and hence limitations periods are viewed as going only to remedy rather than as enacting a substantive bar. *Benes*, 276 F.2d at 108-09.

Second, the language of the habeas statute of limitations at issue in *Wood* is far less definitive as a bar than is the language of the criminal statute of limitations. *Compare* 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."), *with* 18 U.S.C. § 3282(a) ("no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed").

Third, the procedural rules for opposing habeas petitions *require* the government to raise a limitations argument as an affirmative defense in its answer. -- U.S. at --, 132 S. Ct. at 1832; HABEAS CORPUS R. 5(b) ("The answer must * * * state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations."). There is no such requirement for criminal defendants asserting a limitations bar. *See* FED. R. CRIM. P. 12(b)(1) & (3) (motions which "may" and "must" be made before trial, with the statute of limitations not listed among the latter

category, but fitting within the general description of the former category); FED. R. CRIM. P. 12, Notes of Advisory Comm., *Note to Subdivision (b)(1) and (2)* ("defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver * * * include such matters as * * * statute of limitations").

Fourth, in criminal cases, considerations of liberty and lenity routinely provide defendants with greater leeway and impose more stringent burdens on the government. *Santos*, 553 U.S. at 514-15; *Smith*, 360 U.S. at 9. If the government thus can reap the benefit of a forfeiture rule to raise a limitations claim *against* a prisoner seeking habeas relief, then surely a defendant in a criminal case has at least as much claim to a similar rule.

Fifth, just as limitations periods in the habeas context involve interests broader than those of the immediate litigants themselves, -- U.S. at --, 132 S. Ct. at 1833, criminal limitations periods likewise involve such broader interests. *Toussie*, 397 U.S. at 114-15. Indeed, such interests seem meaningfully weightier for criminal limitations periods and certainly have a longer historical pedigree. *Wood*, -- U.S. at --, 132 S. Ct. at 1835 (Thomas, J., concurring in the judgment) ("Prior to the enactment of a habeas statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas practice included no limitations period at all").

Under *Wood*, therefore, mere oversight does not waive a limitations bar; at a minimum something more is required. *Boykin* v. *Alabama*, 395 U.S. 238,

243 (1969) (an effective waiver of constitutional rights cannot be inferred from a silent record).

Because waiver must be an "intentional" act, rather than a mere oversight, it raises related questions regarding the nature and source of the waiver. "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Olano*, 507 U.S. at 733.

In this case, the limitations period in § 3282(a) represents an important right that should only be waivable with the express and knowing consent of the defendant. This Court has noted the distinction between " 'basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client,' " and decisions on " 'manag[ing] the conduct of the trial' " that the attorney may make without direct participation of the client. *Gonzalez v. United States*, 553 U.S. 242, 248 (2008) (quoting *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988)).

Whether to raise or abandon the statute of limitations as a potential bar to prosecution, trial, and punishment, seems to fall easily into the category of a decision requiring informed client consent. The choice does not implicate the day-to-day conduct of a trial, the management of time and scheduling, or decisions made in the heat of litigation where there is no reasonable opportunity for constant explanations to, and potential second-guessing by, the client. There thus is no concern, as in *Gonzalez*, that requiring informed client consent to any waiver would interfere with

"tactical considerations of the moment and the larger strategic plan for the trial," would be "difficult to explain to a layperson," or "could risk compromising the efficiencies and fairness that the trial process is designed to promote." *Gonzalez*, 553 U.S. at 249.

Instead, because waiving the right to assert the statute of limitations risks losing a complete bar to prosecution, trial, and punishment, it is closer in nature to more fundamental and "basic trial choices [that] are so important that an attorney must seek the client's consent in order to waive the right." *Id.* at 250-51 (giving as examples the choices to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal); *see also Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) ("[C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate.").

Indeed, that the failure to raise a limitations issue is so often viewed as ineffective assistance of counsel – falling below the standard of reasonable behavior even apart from determining whether there was prejudice, *see infra* at 56-57 – simply confirms that waiving a limitations bar is a decision of sufficient magnitude and importance that it ought to be done only with the informed consent of the client.

C. At a Minimum, Plain Error Review Is Available for Forfeited Statute of Limitations Bars.

Whatever the nature and characterization of failing to raise a limitations defense, at minimum de-

fendants should still be able to seek review under Rule 52(b) for plain error. That rule provides that

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

FED. R. CRIM. P. 52(b). Merely characterizing an error or defect as inadvertently "waived" is insufficient to preclude the Rule's application.

Under Rule 52(b), a plain error "affecting substantial rights" is one that " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' * * *. An error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Olano*, 507 U.S. at 736-37 (citations omitted).

Limitations defenses, if not viewed as jurisdictional or otherwise reviewable *de novo*, are readily amenable to plain-error review, as a prosecution outside the limitations period calls into question the fairness and integrity of the process. *Franco-Santiago*, 681 F.3d at 14 ("it is in the interests of fairness and integrity that the prosecution be held to the rules governing its own conduct, including in a situation such as this. ' "Every statute of limitations, of course, may permit a rogue to escape," but when a court concludes that the statute does bar a given prosecution, it must give effect to the clear expression of congressional will that in such a case "no person shall be prosecuted, tried, or punished." ' ") (citations omitted). Particularly here, where it was the government's choice to file superseding indictments that triggered the limitations issue, some review is appropriate. *Id.* ("The government's own conduct has brought about this re-

sult, calling into question the integrity and fairness of the process.").

The error in this case also qualifies as plain because the superseding indictments are facially untimely. Whether and how the government might seek to excuse that lateness does nothing to change the initial plainness of the defect. It is the government's burden to argue and prove that the superseding indictments relate back, not Petitioner's burden to preempt such an anticipated response.

D. Structural and Judicial Policy Considerations Favor Allowing Direct Appellate Review of Forfeited Statute of Limitations Bars.

In addition to being the legally correct answer, allowing some form of review of previously unraised limitations bars on direct appeal also is the better answer.

First, the function of the statute of limitations is to provide a check on the government and an eventual immunity for defendants facing the uncertain prospect of federal prosecution. *See Del Percio*, 657 F. Supp. at, 859-860 ("A rule that the running of the statute of limitations cannot be waived in the criminal setting serves a number of important policy functions. Prime among these is restraint of governmental powers."). Prosecutions brought outside the limitations period injure not only the defendant, but the public as well, by rendering uncertain a check imposed by Congress on the government's exercise of its power to threaten and take citizens' liberty. *Id.* ("While statutes of limitations are generally thought

of as protecting individuals * * *, they also serve to restrain the power of the sovereign to act against an accused. * * * The jurisdictional view of the statute of limitations * * * ensures that these two functions do not merge. Under the jurisdictional approach, the statute of limitations exerts an independent force on the government.").

The prospect that the limitations period may be waived simply encourages the government to file claims outside the limitations period in the hopes that the argument will be waived by overworked defense counsel or that the mere threat of conviction might induce a plea before a potential limitations defense is fully explored. It is the public good that is injured by such incentives for aggressive government prosecution beyond the checks Congress has imposed.

Particularly in circumstances like in this case, requiring the government to justify its ever-evolving indictments against limitations claims provides a check against government circumvention of the limitations period and against many of the concerns that justify limitations periods and the prohibition of double jeopardy. Such interests are best served by ensuring the government's compliance with the clear prohibitions of § 3282(a), notwithstanding any error or neglect on the part of a defendant or his counsel.

Second, allowing at least some form of review of overlooked limitations bars also serves the interests of efficient judicial administration. Failure to raise a limitations defense is a common source of complaints that trial counsel was ineffective. *See, e.g., United States v. Coutentos*, 651 F.3d 809, 818 (8th Cir. 2011) (sustaining an ineffective assistance of counsel claim

and vacating conviction where counsel failed to timely raise a statute-of-limitations issue); *United States v. Acevedo*, 229 F.3d 350, 353 (2d Cir. 2000) (Sotomayor, J.) (addressing an ineffective assistance of counsel claim predicated on failure to raise a statute-of-limitations claim at trial, but finding that indictment was timely); *United States v. Diehl*, 775 F.3d 714, 719-21 (5th Cir. 2015) (same); *United States v. Aburahmah*, 34 F.3d 1074 (9th Cir. 1994) (unpubl.) (refusing to consider limitations issue not raised at trial, declining to consider ineffective assistance claim in the first instance, and noting that such claim is reserved for habeas proceedings). Allowing direct review of a limitations defense not raised at trial would mitigate the need for subsequent petitions on that issue by resolving more limitations questions on direct appeal and hence providing a more immediate remedy to any claimed ineffective assistance.

As Justice Scalia has noted in a somewhat related context, even where client consent to the waiver of a right is not required by the Constitution or the Federal Rules, "it is certainly prudent, to forestall later challenges to counsel's conduct, for a trial court to satisfy itself of the defendant's personal consent to certain actions, such as entry of a guilty plea or waiver of jury trial, for which objective norms require an attorney to seek his client's authorization." *Gonzalez*, 553 U.S. at 258 (Scalia, J., concurring in the judgment). It would be equally "prudent" for appellate courts to consider forfeited limitations claims and likewise "forestall later challenges to counsel's conduct."

CONCLUSION

For the reasons above, this Court should reverse the decision of the court of appeals and remand for further proceedings.

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No. 14-1095

In the Supreme Court of the United States

MICHAEL MUSACCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a sufficiency-of-the-evidence challenge to a criminal conviction must be analyzed in light of a jury instruction that added an unnecessary element to the offense charged in the indictment, when the government did not object to that instruction at trial.

2. Whether a criminal defendant may successfully raise a statute-of-limitations defense for the first time on direct appeal.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is not published in the Federal Reporter but is reprinted in 590 Fed. Appx. 359.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2014. A petition for rehearing was denied on December 9, 2014 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on March 9, 2015, and was granted on June 29, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent statutory provisions and rules are reproduced in the appendix to this brief. App., *infra*, 1a-25a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiracy to access without authorization a protected computer, in violation of 18 U.S.C. 371 and 18 U.S.C. 1030(a)(2)(C) (2006); and on two counts of unauthorized access of a protected computer, in violation of 18 U.S.C. 1030(a)(2)(C) (2006). Petitioner was sentenced to a total of 63 months of imprisonment, to be followed by three years of supervised release. Pet. App. B1-B5. The court of appeals affirmed. *Id.* at A1-A16.

1. Petitioner served as President of Exel Transportation Services (ETS), a shipping-logistics company. Pet. App. A1. While still holding that position, he told Joseph Roy Brown, the head of ETS's information-technology (IT) department, that he might leave ETS and start a rival company. ROA 1545-1547. Brown's position at ETS made him a "god on the [ETS] network," with unlimited access to the company's computer system, including the ability to access employees' e-mail accounts. ROA 2023. Petitioner made clear that he wanted Brown to join him at the new company. ROA 1546-1547.

In 2004, petitioner resigned from ETS. ROA 1353. Soon thereafter, petitioner asked Brown—who was still working at ETS—to exploit his access to ETS's computer system and pass along information that would help petitioner in starting the new company to compete with ETS. ROA 1550-1552. Brown agreed and began providing petitioner with confidential details of ETS's revenue projections, its personnel decisions, and its contractual relationships with outside agents through whom ETS conducted its operations.

See ROA 1552, 1563-1566, 1613, 1620-1622, 1640. In most cases, Brown obtained the information by covertly accessing and reviewing the email accounts of top ETS executives without authorization. ROA 1347, 1572-1573, 1866-1867. During this period, petitioner lauded Brown as a "Master" and referred to him as "007." ROA 1569-1570. Brown responded by agreeing that he was "becoming an excellent spy." ROA 1569.

In October 2005, petitioner formed his rival company, Total Transportation Services (TTS). Pet. App. A1. Brown joined TTS later that same month. *Id.* at A1-A2. Nonetheless, Brown continued to access ETS's computer system without authorization by using Microsoft Outlook Web Access and "a backdoor password" that "no one else [could] change." ROA 1347, 1630-1631, 2036-2037, 2448, 2620, 2629. Brown also supplied petitioner with the password so that petitioner could access the ETS system himself. ROA 1659-1660. Petitioner used ETS's confidential information to interfere with ETS's efforts to sign new contracts with its outside agents and for other purposes. ROA 1645-1646; Pet. App. A2.

Petitioner and Brown continued to access the ETS system until March 2006, when ETS discovered the breach and changed the administrative passwords. ROA 1731-1732, 2041-2042. ETS sued TTS, petitioner, Brown, and others involved, and the parties eventually settled for $10 million. Pet. App. A2.

2. a. In 2010, a grand jury indicted petitioner for his improper accessing of ETS's computer system. Count 1 charged him with "Conspiracy To Make Unauthorized Access to [a] Protected Computer and To Exceed Authorized Access to [a] Protected Computer," in violation of 18 U.S.C. 371 and 18 U.S.C.

1030(a)(2)(C) (2006). J.A. 49. Counts 23 and 24 charged him with (1) unauthorized access of ETS's e-mail server "[o]n or about" November 24, 2005, in violation of 18 U.S.C. 1030(a)(2)(C) (2006); and (2) unauthorized access of the e-mail account of ETS's legal counsel "[o]n or about" January 21, 2006, also in violation of 18 U.S.C. 1030(a)(2)(C) (2006). J.A. 70-71; see generally J.A. 46-79; Pet. App. A2-A3.[1]

In 2012, the government filed a superseding indictment that revised the conspiracy charge. The superseding indictment removed references to "[e]xceed[ing] [a]uthorized [a]ccess" in the count's summary of the offense. J.A. 79; Pet. App. A2-A3, A6. It continued to allege acts of "exceed[ing] authorized access" in defining the objects as well as the manner and means of the conspiracy. J.A. 81-82; Pet. App. A2, A6.

The superseding indictment also modified the charge relating to petitioner's unauthorized access of ETS's e-mail server in November 2005. As relevant here, Count 2 of the superseding indictment identified the targets of the access as the e-mail accounts of ETS's president and legal counsel (replacing the reference to ETS's e-mail server), and it stated that the offense had been committed "[o]n or about" November 23-25, 2005. J.A. 83-84; Pet. App. A2-A3. In 2013, the government filed a second superseding indictment that was materially identical to the first superseding indictment in all relevant respects. J.A. 92, 111-112; Pet. App. A3.

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[1] Section 1030(a)(2)(C) makes it unlawful for a person to "intentionally access[] a computer without authorization or exceed[] authorized access, and thereby [to] obtain[] * * * information from any protected computer." 18 U.S.C. 1030(a)(2)(C) (2006).

b. In February 2013, petitioner proceeded to a jury trial. At no time before or during the trial did petitioner contend that his prosecution on any of the counts violated the five-year statute of limitations set forth at 18 U.S.C. 3282(a). Pet. App. A8-A9. Nor did he ever request that the jury be instructed with respect to the statute of limitations. See Doc. 134, 154.

Both before and during the trial, the government submitted proposed jury instructions addressing the conspiracy count. J.A. 85-88 (Sept. 7, 2012), 115-119 (Feb. 1, 2013), 120-124 (Feb. 26, 2013). Each of those proposed instructions identified that charge as involving "Unauthorized Access to Protected Computer[s]," and none required the jury also to find that the conspiracy involved *exceeding* authorized access to such computers. *Ibid.* Petitioner did not propose his own instructions addressing the conspiracy count. See Doc. 134, 154.

On February 26, 2013, following the close of the government's evidence, petitioner moved for an acquittal under Federal Rule of Criminal Procedure 29. J.A. 8. His motion did not address the elements of the crime or assert that the government had failed to prove that he had conspired to exceed authorized access to the ETS computer system. See Doc. 164.

On February 27, 2013—immediately after petitioner rested his case—the district court held a charging conference to discuss a draft of the jury instructions that the court had prepared. See J.A. 141-143. At that conference, neither the government, petitioner, nor the district court expressed the view that the jury should be required to find that petitioner had exceeded authorized access to a protected computer in order to find him guilty of the conspiracy charge. *Ibid.*

The following day, the district court provided a revised draft of the jury instructions to the parties. J.A. 144. As revised, the instruction on the conspiracy count stated that 18 U.S.C. 1030(a)(2)(C) (2006), the statute providing the object of the conspiracy, "makes it a crime for a person to intentionally access a protected computer without authorization *and exceed authorized access*." J.A. 168, 177 (emphasis added). It later stated that to find petitioner guilty on the conspiracy charge, the jury would need to find that petitioner and at least one other person had "made an agreement to commit the crime of unauthorized access to a protected computer in violation of 18 U.S.C. § 1030(a)(2)(C) *as defined above*." J.A. 168 (emphasis added).

That jury instruction was erroneous: Section 1030(a)(2)(C) expressly states that a person can violate the statute either by (1) intentionally accessing a protected computer without authorization *or* (2) intentionally exceeding authorized access. 18 U.S.C. 1030(a)(2)(C) (2006). Pet. App. A5; see Pet. 4 (noting that these are "two discrete means of committing the crime"). By using the conjunction "and" when referring to both ways of committing the offense, the instruction appeared to require the government to prove an extra element to establish the crime. J.A. 168; Pet. App. A5. Neither the government nor petitioner objected to that error in the charge, which was subsequently given to the jury. Pet. App. A3.[2]

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[2] The district court's inclusion of the extra element was an inadvertent error not intended by the parties or the court. See, *e.g.*, Pet. App. A6; J.A. 86-88, 116-119, 121-124 (government's proposed instructions omitting that element); Pet. C.A. Br. 17-18 (arguing that government "abandoned" conspiracy charge based on "ex-

c. On March 1, 2013, the jury found petitioner guilty on all three counts. Pet. App. B1-B2; Doc. 166. Two weeks later, petitioner moved for a new trial under Federal Rule of Criminal Procedure 33. Doc. 170. At a sentencing hearing held in July 2013, the district court denied petitioner's pending motions under Rules 29 and 33. Pet. App. D2. In September 2013, the district court imposed concurrent terms of 60 months of imprisonment for the conspiracy count and the first unauthorized-access count, and a consecutive term of three months of imprisonment for the remaining unauthorized-access count, to be followed by three years of supervised release. *Id.* at B3, B5.[3]

3. The court of appeals affirmed the convictions in an unpublished, per curiam opinion. Pet. App. A1-A16. It rejected the two challenges that petitioner now advances in this Court.

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ceeding authorized access" by omitting that element from its "thrice proposed instructions"); see also J.A. 180 (September 2013 colloquy in which district court and government mistakenly recollected that jury had been "charged * * * only on unauthorized access," and not on "exceeding authorized access").

[3] After the district court denied the Rule 29 motion in July 2013, petitioner filed two "supplement[s]" to that motion on August 29, 2013, and November 19, 2013. J.A. 11, 14. Those supplements were the first occasions on which petitioner sought an acquittal on the conspiracy charge on the grounds that the government had failed to introduce sufficient evidence that he had conspired to exceed authorized access to ETS's computer system. See Doc. 199, at 1-12; Doc. 221, at 1-7. As the government pointed out in response, petitioner's supplements were both moot (because the original Rule 29 motion being supplemented had already been denied) and untimely (under Fed. R. Crim. P. 29(c)). Doc. 225, at 1-3. The court did not take any action on either of petitioner's supplements to his Rule 29 motion.

a. As to Count 1, petitioner argued that the evidence was insufficient to support his conviction for conspiracy. Pet. C.A. Br. 15-27. He did not dispute that the evidence was sufficient to prove the charged offense of conspiracy to obtain unauthorized access to ETS's computers. See *ibid.*; Pet. App. A5, A7. But he asserted that (1) the erroneous jury instruction requiring the government also to prove that the conspiracy encompassed "exceed[ing] authorized access" to ETS's computers was "law of the case" on direct appeal, and (2) the evidence was insufficient to prove such a conspiracy. Pet. App. A5.

The court of appeals declined to apply law-of-the-case principles to evaluate petitioner's challenge to the sufficiency of the evidence under the incorrect jury instruction. Pet. App. A5-A7. The court acknowledged circuit precedent establishing that, "[i]n general," unobjected-to jury instructions that increase the government's burden are treated as "law of the case" on direct appeal. *Id.* at A5-A6 (quoting *United States* v. *Jokel*, 969 F.2d 132, 136 (5th Cir. 1992) (per curiam)). But the court also noted that this rule does not apply where (1) the jury instructions are "patently erroneous," and (2) "the issue is not misstated in the indictment." *Id.* at A6 (citation omitted).

The court of appeals found both of those conditions satisfied here. Pet. App. A5-A7. It emphasized that the jury instructions' "replacement of 'or' with 'and' was an obvious clerical error, not a possible alternative description of the offense." *Id.* at A6. It further noted that petitioner "does not dispute the sufficiency of the evidence" of unauthorized access of the computers at issue, and it rejected petitioner's insufficiency challenge on that basis. *Id.* at A7. Relatedly, the

court made clear that petitioner had not been prejudiced by any error or confusion with respect to the jury instruction, stating that "[i]f that error affected the trial at all, it benefited [petitioner] and does not justify reversal." *Id.* at A10.[4]

b. As to Count 2, petitioner argued that his prosecution for the November 2005 unauthorized-access offense was barred by the five-year statute of limitations in 18 U.S.C. 3282(a). Pet. App. A8. Petitioner pointed out that the first superseding indictment was issued in September 2012, nearly seven years after the conduct charged in Count 2. Pet. C.A. Br. 48. He asserted that the second superseding indictment did not relate back to the original indictment—which was filed within the limitations period on November 2, 2010—because the latter indictment "broadened and substantially amended the charges" set forth in Count 2. *Id.* at 48-50 & n.114. Specifically, petitioner pointed out that the second superseding indictment alleged (1) that the offense occurred on or about November 23-25, instead of on or about November 24; and (2) that petitioner unlawfully accessed "Exel email accounts of Exel President and Exel legal counsel" instead of "Exel server." *Id.* at 49.

Petitioner acknowledged that because he had not raised his statute-of-limitations defense at trial, review should be only for "plain error." Pet. C.A. Br. 48

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[4] Judge Haynes concurred in the court of appeals' judgment with respect to the conspiracy charge but declined to address the merits of petitioner's "law of the case" argument. Pet. App. A16. She concluded that even if the jury instruction was binding, the evidence was sufficient to establish that petitioner violated "both prongs ('exceeds authorized use' and 'unauthorized access')" of Section 1030(a)(2)(C). *Ibid.*

n.114. He conceded that in most circumstances, a defendant "waive[s]" such a defense—and thereby renders it unreviewable—by failing to raise it at trial. Pet. C.A. Reply Br. 28 & n.19. But he asserted that this principle should not bar review of his particular claim because that claim turns on a pure legal defect evident "upon the face of the indictment." *Id.* at 28 n.19; see Pet. Br. 55; Pet. 21; Pet. C.A. Br. 48-50.

The court of appeals rejected petitioner's argument that Count 2 was barred by the statute of limitations. Pet. App. A8-A9. The court explained that petitioner had waived the defense by failing to raise it at trial. *Ibid.* (citing *United States* v. *Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (per curiam), cert. denied, 503 U.S. 908 (1992)). It rejected petitioner's request for an exception to the waiver rule "where the issue can be resolved on the face of the indictment." *Id.* at A9.

SUMMARY OF ARGUMENT

I. The jury in this case unquestionably found that the government established petitioner's guilt on every element of conspiring to obtain unauthorized access to computers, in violation of 18 U.S.C. 1030(a)(2)(C) (2006). Petitioner concedes that the government presented sufficient evidence to prove those statutory elements. See Pet. App. A5, A7. Petitioner nonetheless contends that he is entitled to a judgment of acquittal because of the government's failure to prove an *extra* element of the offense that was included in the jury instructions as the result of an "obvious clerical error." *Id.* at A6. According to petitioner, the government's failure to object to the extra element renders that element binding for purposes of sufficiency-of-the-evidence review. That argument fails for two independent reasons.

First, sufficiency review requires a court to assess whether the government has introduced enough proof of the established statutory elements of the crime for which the defendant was charged in the indictment. The instructions given to the jury—whether correct or incorrect—do not bear on the proper resolution of such a challenge. Accordingly, the government's failure to object to an erroneous instruction does not affect the sufficiency analysis. Those conclusions follow from both the constitutional underpinnings of sufficiency review and this Court's analysis of the parallel issue in civil cases. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513 (1988); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988) (plurality opinion of O'Connor, J.).

Second, even if jury instructions do ordinarily bear on the sufficiency analysis, the government's failure to object to an obvious instructional error does not prevent a reviewing court from applying the correct legal standard on appeal. Settled principles of appellate review allow the reviewing court to take account of the error—regardless of any failure to object—because an appellee can defend a judgment on a ground not raised below and, in any event, a reviewing court can notice such a plain error. See, *e.g.*, *Greenlaw* v. *United States*, 554 U.S. 237, 250 n.5 (2008); Fed. R. Crim. P. 52(b).

Petitioner argues that the law-of-the-case doctrine requires an appellate court to review his sufficiency challenge under the erroneous jury instructions. That is incorrect. As this Court has recognized, the law-of-the-case doctrine does not apply to an appellate court's review of trial court holdings. See *United States* v. *Wells*, 519 U.S. 482, 487 n.4 (1997) (calling

the doctrine a "misnomer" in this context). And even if it did, that doctrine does not require an appellate court to apply a patently erroneous jury instruction. See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997); *United States* v. *Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), cert. denied, 546 U.S. 1115 (2006). The government's inadvertent failure to object to the jury instructions thus does not entitle petitioner to a windfall acquittal in this case.

II. Petitioner also challenges the court of appeals' rejection of the statute-of-limitations defense that he belatedly raised for the first time on appeal. He argues that such a defense raises a non-waivable jurisdictional question and that, in any event, he can obtain relief under Federal Rule of Criminal Procedure 52(b)'s plain-error standard.

Petitioner is mistaken. As this Court has consistently held for over 140 years, the statute of limitations is a non-jurisdictional affirmative defense that becomes part of a case if—and only if—it is raised by the defendant. See *Smith* v. *United States*, 133 S. Ct. 714, 719-720 (2013); *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 173-181 (1872). The text of the statute does not clearly state that it is a jurisdictional limit, and treating it as jurisdictional is inconsistent with numerous precedents of this Court.

A district court's failure to address a statute-of-limitations defense that a defendant never raised can never constitute a "plain error" for purposes of Rule 52(b). The defendant's failure to raise the defense—whether or not it is characterized as a "waiver"—means that the government was not required to establish compliance with the statute of limitations. And the government's failure to satisfy a non-existent

burden is not an error. Petitioner's contrary theory contradicts this Court's analysis in *Cook* and the longstanding practice of the majority of courts of appeals. His conviction should be affirmed.

ARGUMENT

I. PETITIONER'S SUFFICIENCY-OF-THE-EVIDENCE CHALLENGE IS CORRECTLY ANALYZED IN LIGHT OF THE STATUTORY ELEMENTS OF THE CRIME

A. The Sufficiency Of The Evidence Is Measured Against The Statutory Elements Of The Offense Charged In The Indictment

When a criminal defendant challenges a conviction on grounds of insufficient evidence, a reviewing court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). In a federal prosecution, the "essential elements" of the crime refers to the elements as defined by Congress, because Congress—not courts or prosecutors—has the authority to define the elements of federal crimes. See, *e.g.*, *Whalen* v. *United States*, 445 U.S. 684, 689 (1980); see also *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is * * * dispositive" unless the statute is unconstitutional.).[5]

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[5] Facts that enhance a mandatory minimum or maximum sentence must, as a matter of constitutional law, be treated as elements. See *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013); *Ap-*

The purpose of the *Jackson* analysis is to ensure that the conviction comports with the constitutional guarantee of due process of law. See 443 U.S. at 313-316. Due process does not require that the evidence presented at trial be sufficient to establish a non-element that was erroneously included in the jury instructions. As this Court's decisions make clear, sufficiency-of-the-evidence review turns on whether the case should have been submitted to the jury in the first place—not on whether the evidence satisfies an erroneous jury instruction. Jury instructions are not a relevant component of the sufficiency analysis, and the government's failure to object to an erroneous instruction thus has no bearing on that analysis.

1. The *Jackson* standard for assessing the sufficiency of the evidence supporting a criminal conviction implements two core due process principles. First, *Jackson* requires the government to introduce affirmative evidence of the defendant's guilt. 443 U.S. at 314. That requirement reflects the principle "that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Ibid.* As this Court explained, "a *meaningful* opportunity to defend" against criminal charges does not exist unless "a total want of evidence to support a charge will conclude the case in favor of the accused." *Ibid.* (emphasis added). Second, *Jackson* requires not merely *some* evidence of guilt, but rather enough evidence capable of persuading a rational jury "beyond a reasonable doubt." *Ibid.* That heightened standard of proof gives "'concrete substance' to the presumption of innocence" as a means of "ensur[ing]

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prendi v. *New Jersey*, 530 U.S. 466 (2000). No such facts are at issue in this case.

against unjust convictions" and "reduc[ing] the risk of factual error in a criminal proceeding." *Id.* at 315 (citation omitted).

Neither of the two due process principles animating *Jackson* is threatened by a jury instruction that requires the government to prove *more* than is required by the statute. So long as the instruction requires the jury to find evidence of guilt with respect to the actual, statutory elements of the crime, the defendant will have had a "meaningful opportunity to defend" against the charge. *Jackson*, 443 U.S. at 314. And so long as the jury is required to find those statutory elements "beyond a reasonable doubt," the defendant has been accorded the constitutionally required procedure to protect the presumption of innocence. *Id.* at 314-315.

Petitioner suggests (Br. 34-35) that sufficiency review is also designed to protect against jury irrationality or the jury's failure to understand the jury instructions, which, he asserts, is better judged by measuring the evidence against the instructions given. But sufficiency review asks whether "*any*" rational jury could have found the "essential elements," *Jackson*, 443 U.S. at 319; it does not seek to probe the workings of the actual jury, see *id.* at 319 n.13 (noting that "[t]he question whether the evidence is constitutionally sufficient is * * * wholly unrelated to the question of how rationally the verdict was actually reached"); see also *United States* v. *Powell*, 469 U.S. 57, 61-69 (1984) (inconsistent verdict does not justify setting aside a conviction supported by sufficient evidence under *Jackson*, even when the inconsistency violates the jury instructions).

For those reasons, the government's failure to introduce sufficient evidence of a non-element does not implicate the due process interests protected by *Jackson*. Whether the jury instructions erroneously required proof of such a non-element—and whether the government objected to any such instructions—therefore have no effect on sufficiency analysis.

2. This Court's decisions confirm that the sufficiency of the evidence does not turn on the content of jury instructions. For example, in *Burks* v. *United States*, 437 U.S. 1 (1978), this Court likened a court's decision to overturn a jury verdict because of insufficient evidence to a determination "that the government's case was so lacking that it should not have even been *submitted* to the jury." *Id.* at 16. Similarly, the Court has stated that an appellate court's "reversal for insufficiency of the evidence *is equivalent to a judgment of acquittal.*" *McDaniel* v. *Brown*, 558 U.S. 120, 131 (2010) (per curiam) (emphasis added); see *Lockhart* v. *Nelson*, 488 U.S. 33, 39 (1988) (same).

Those statements make clear that a party's right to an acquittal based on insufficient evidence does not turn on the particular instructions given to the jury. Indeed, Federal Rule of Criminal Procedure 29(a) allows a party to seek a judgment of acquittal at the close of the government's evidence—well before the instructions are usually finalized or delivered to the jury. Although sufficiency analysis and jury instructions require the court to consider the elements of the crime, they are procedurally and analytically distinct components of a criminal trial. The government's inadvertent failure to object to an erroneous jury instruction should therefore have no implication what-

soever for the proper adjudication of a motion for acquittal.

3. In the civil context, this Court has held that the sufficiency of the evidence supporting a jury verdict must be judged with reference to a correct understanding of the law—regardless of a party's failure to object to jury instructions. The Court's analysis in those cases tracks the logic set forth above, and it expressly rejects the law-of-the-case theory advanced by petitioner here. No reason exists to apply a different analysis to the relationship between sufficiency challenges and jury instructions in the criminal context.

In civil cases, a party can seek judgment as a matter of law based on the insufficiency of the evidence by filing a motion under Federal Rule of Civil Procedure 50. See Fed. R. Civ P. 50(a) and (b). The legal standard that applies to such motions is essentially the same one that applies to a district court's ruling on a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29, and to an appellate court's review of a judgment of conviction for sufficiency of the evidence under *Jackson*.[6] In each of those contexts, the court's role is to consider the evidence and assess whether any rational jury could find the facts necessary to establish a claim or defense in light of

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[6] See Fed. R. Civ. P. 50(a)(1) (requiring court to grant motion if court finds that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-moving] party"); Fed. R. Crim. P. 29(a) (stating that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction"); *Jackson*, 443 U.S. at 319 (requiring appellate court to assess "whether * * * *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

the evidence presented at trial. "In terms of the nature of the inquiry," a court's analysis of a motion for summary judgment or a directed verdict in a civil case "is no different from the consideration of a motion for acquittal in a criminal case." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

This Court has twice confronted whether a party's failure to object to an erroneous jury instruction renders that instruction binding "law of the case" for purposes of appellate review of the denial of a motion for judgment as a matter of law. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513 (1988); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988) (plurality opinion of O'Connor, J.). In *Praprotnik*, the plurality rejected such a law-of-the-case argument, and in *Boyle*, the plurality's analysis became law.

The *Praprotnik* plurality noted that "the focus of [the plaintiff's] challenge is not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict." 485 U.S. at 120. It explained that "[a]lthough the same legal issue was raised both by those motions and by the jury instruction, the failure to object to an instruction does not render the instruction the law of the case for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict." *Ibid.* (citation and internal quotation marks omitted).

In *Boyle*, the Court relied on that explanation to hold that review of the sufficiency of the evidence takes place under the correct legal standard despite a failure to object to jury instructions containing an incorrect standard. It held that "even though (as [the plaintiff] claims) [the defendant] failed to object to jury instructions that expressed the [military-

contractor] defense differently," the defendant was entitled to challenge sufficiency under the correct legal test. *Boyle*, 487 U.S. at 513-514 (citing *Praprotnik*, 485 U.S. at 118-120 (plurality opinion of O'Connor, J.)).

Boyle's holding relied directly on the analysis earlier offered by Judge Friendly and other lower courts. See, *e.g.*, *Ebker* v. *Tan Jay Int'l, Ltd.*, 739 F.2d 812, 825 n.17 (2d Cir. 1984) (Friendly, J.) (cited in *Boyle*, 487 U.S. at 514), cert. denied, 502 U.S. 853 (1991); see also 9B Charles Alan Wright et al., *Federal Practice and Procedure* § 2537, at 625 n.37 (3d ed. 2008) (citing cases) (*Federal Practice and Procedure*); 9C *id.* § 2558, at 142, 181 n.11 (same). As the Ninth Circuit has explained, *Boyle* and *Praprotnik* rest on the recognition that a "motion for directed verdict, although sometimes overlapping with the points of law reflected in the jury instructions, is distinct" from any dispute over those instructions. *Air-Sea Forwarders, Inc.* v. *Air Asia Co.*, 880 F.2d 176, 183 (1989), cert. denied, 493 U.S. 1058 (1990). Whether a party is entitled to a directed verdict "depends upon the sufficiency of the evidence up to that point in the trial," and "the jury instructions on the points of law contained in the motion for directed verdict are simply outside the scope of that analysis." *Ibid.* It follows that "a party's failure to object to relevant jury instructions does not prevent it from challenging the sufficiency of the evidence on a legal basis different from that contained in the instructions." *Id.* at 182. This Court should apply that same analysis here.[7]

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[7] In one unusual situation, some courts have stated that the jury instructions are relevant to sufficiency analysis: where the law has been clarified after trial to narrow the scope of a criminal offense,

B. The Government's Inadvertent Failure To Object To Jury Instructions Does Not Require An Appellate Court To Perpetuate The Error When Reviewing A Conviction For Sufficiency Of The Evidence

Even if courts should generally look to jury instructions when assessing the sufficiency of the evidence—which they should not—that principle would not mean that courts are always bound to apply instructions that reflect a clear error of law. Petitioner appears to agree that if the government objects to erroneous jury instructions adding an extra element of the offense, that objection can be resolved by the court of appeals before the court considers whether the evidence was sufficient to sustain the defendant's conviction. Petitioner's version of the law-of-the-case doctrine applies only if the government *fails* to object.

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and thus require proof of an element not required at the time of trial. In that situation, some courts have evaluated sufficiency under the jury instructions given at trial. See, *e.g.*, *United States* v. *Houston*, 792 F.3d 663, 669-670 (6th Cir. 2015); see also U.S. Br. in Opp. at 12-15, *McWane, Inc.* v. *United States*, No. 08-364 (Oct. 30, 2008). The rationale underlying that analysis is that the Double Jeopardy Clause's preclusion of retrial when evidence is insufficient, see *Burks*, *supra*, should not bar retrial when the government introduced sufficient evidence under the law as understood at the time of trial; otherwise, the government would be held to "a standard it did not know it had to satisfy." *Houston*, 792 F.3d at 670. But even in that situation, the more accurate description is not that the jury instructions at trial control the sufficiency analysis; rather, the law at the time of trial (which is usually reflected in the instructions) controls the sufficiency analysis in order to avoid a windfall acquittal that does not serve double-jeopardy purposes. *Ibid.* Petitioner's approach, in contrast, would produce a windfall acquittal when the law *never* required proof of the erroneous element in the jury instructions.

See, *e.g.*, Pet. Br. 14, 19-20, 24, 33 (describing his doctrine as "an estoppel of sorts").

That means, however, that—on petitioner's own view—the question of which elements govern the sufficiency analysis in any particular case ultimately turns on principles of waiver, forfeiture, and estoppel relating to erroneous jury instructions. That approach is unsound, for the reasons described above. But if that approach did apply, then standard doctrines of waiver, forfeiture, and estoppel would govern. And those doctrines—as recognized in this Court's decisions and in Federal Rule of Criminal Procedure 52(b)—establish that the government's failure to object does not altogether foreclose its opportunity, as appellee, to challenge a plainly erroneous jury instruction on the elements of the offense for the first time on appeal.

1. This Court has long made clear that an appellee may defend a judgment in its favor on any ground supported by the existing record. See, *e.g.*, *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924). That rule permits an appellee to invoke new legal arguments on appeal to support the judgment. As the Court recently explained in *Greenlaw* v. *United States*, 554 U.S. 237 (2008), "[a]n appellee or respondent may defend the judgment below on a ground not earlier aired." *Id.* at 250 n.5. The Court has regularly applied that rule and ruled in favor of appellees based on arguments that they did not advance in the district court.[8]

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[8] See, *e.g.*, *Schweiker* v. *Hogan*, 457 U.S. 569, 584-585 & n.24 (1982) ("Although appellees did not advance this argument in the District Court, they are not precluded from asserting it as a basis on which to affirm that court's judgment" based on the "well

The Court has also noted that appellate courts have discretion *not* to address an appellee's new arguments, on a case-by-case basis. See, *e.g.*, *Singleton* v. *Wulff*, 428 U.S. 106, 120-121 (1976). Restraint may be appropriate when the proper resolution is doubtful, *id.* at 121, or resolving it would unfairly deprive the opposing party of the chance to introduce evidence or contest the relevant issues, *id.* at 120; *Giordenello* v. *United States*, 357 U.S. 480, 487-488 (1958). But that is ordinarily not a concern when the government, as appellee, raises a purely legal argument to support a judgment, to which the defendant can respond in a reply brief.

When a defendant asks a court of appeals to reverse a conviction for insufficiency based on an incorrect statement of the offense elements in the jury instructions, an appellate court thus has discretion to apply the correct rule of law despite the government's failure to object to an erroneous standard below. Although petitioner argues (Br. 33) that the government's failure to object to the jury instructions' erroneous statement of the elements operates as an "estoppel of sorts," this Court has emphasized that "[t]here can be no estoppel in the way of ascertaining the existence of a law." *United States Nat'l Bank of*

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accepted" rule that "an appellee may rely upon any matter appearing in the record in support of the judgment below.") (citation omitted); *Helvering* v. *Gowran*, 302 U.S. 238, 245-247 (1937) (allowing government to raise a new argument as appellee); *United States* v. *Williams*, 278 U.S. 255, 255-256 (1929) (affirming based "upon a ground urged here by the [appellee], but apparently, it is fair to say, not suggested to either court below"); see also *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (noting that respondent may "rely on any legal argument in support of the judgment below," even if "made for the first time in this Court").

Or. v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (brackets in original) (quoting *Town of S. Ottawa* v. *Perkins*, 94 U.S. 260, 267 (1877)). The same should be true in correctly defining the elements of the offense against which the sufficiency of the evidence is measured.

2. Alternatively, even setting aside normal appellate principles permitting an appellee to raise a new argument to defend the judgment, Federal Rule of Criminal Procedure 52(b) allows a court of appeals to consider a plain instructional error adding an extra element to a criminal offense when reviewing a defendant's conviction for sufficiency of the evidence.

a. Rule 52(b) establishes a general principle governing the circumstances in which a court may consider an unwaived error despite a party's failure to object at the appropriate time during trial. It states that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

In *United States* v. *Olano*, 507 U.S. 725 (1993), this Court held that to qualify as "plain," an error must be "clear" or "obvious." *Id.* at 734 (citation omitted). An error "affects substantial rights" if it is "prejudicial," *i.e.*, if it would "affect[] the outcome" of the case. *Ibid.* (brackets and citation omitted). This Court has further held that Rule 52(b) is "permissive, not mandatory," and that the rule should be employed to prevent "miscarriage[s] of justice," defined as circumstances in which "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 735-736 (second set of brackets in original) (citation and internal quotation marks omitted).

Rule 52(b) makes no distinction between errors raised by the government and those raised by criminal defendants. Courts have generally recognized that the government may obtain plain-error review under Rule 52(b) in appropriate circumstances.[9]

b. No textual reason precludes applying Rule 52(b) in the situation presented here, where an appellee is invoking that rule—defensively—to correct a plain error (here, the extra element in the jury instructions) that the appellant is relying upon in order to establish a different error (here, the alleged insufficiency of the evidence with respect to that element). Rule 52(b) establishes that an appellate court may "consider" an instructional error requiring the government to prove an extra element of the crime—even if the government failed to "br[ing] [that error] to the court's attention"—so long as the error satisfies the *Olano* standard. Here, that means that an appellate court can ignore the extra element erroneously included in the instructions when reviewing the conviction for sufficiency of the evidence.

3. Under settled principles of review or under Rule 52(b), the court of appeals did not abuse its discretion when it considered the instructional error at issue

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[9] See generally U.S. Br. at 44-46, *Greenlaw*, *supra*, No. 07-330 (Nov. 13, 2007) (analyzing text of Rule 52(b) and surrounding provisions, and citing cases from 12 circuits); *United States* v. *Jackson*, 207 F.3d 910, 917 (7th Cir.), vacated on other grounds, 531 U.S. 953 (2000). Petitioner points out (Br. 27) that "plain-error review is typically invoked by defendants, not the government," but this empirical observation reflects the limited bases on which the government may appeal an interlocutory or final decision, 18 U.S.C. 3731, 3742, coupled with the screening process within the government before approving appeals. It does not reflect any legal barrier preventing the government from invoking the rule.

here. First, as that court recognized—and as petitioner does not dispute—the requirement that the jury find an extra element of the offense was "an obvious clerical error." Pet. App. A6; see pp. 5-6, 8-9, *supra*; *Olano*, 507 U.S. at 734.

Second, petitioner seeks to rely on the instructional error in order to establish that the evidence was insufficient—and thus to obtain a judgment of acquittal. That error plainly threatens to "affect[] the outcome" of the case, the normal test for showing that an error affects substantial rights. *Olano*, 507 U.S. at 734 (citation omitted).

Third, recognizing the plain instructional error would avoid a "miscarriage of justice" and preserve the "fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citations omitted). Petitioner suggests that "manifest injustice" can never result when a defendant escapes criminal liability—even when overwhelming evidence establishes his guilt. Pet. Br. 31-32 (citation omitted). This Court has repeatedly rejected that conclusion, however, in cases decided under Rule 52(b) and *Olano*. See *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997) (rejecting defendant's plain-error argument and noting that reversing his conviction would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," given the "overwhelming" evidence of guilt as to disputed element) (citations omitted); *United States* v. *Cotton*, 535 U.S. 625, 634 (2002) (similar).

Here, the evidence establishing that petitioner committed the crime of conspiring to obtain unauthorized access to the ETS computer system was overwhelming. See Gov't C.A. Br. 3-21; Pet. App. A7.

Petitioner does not—and cannot—dispute that point. And the jury found all of the statutory elements of that crime beyond a reasonable doubt. The court of appeals correctly determined that, to the extent that the instructional error had any effect on the trial at all, it operated to petitioner's advantage. Pet. App. A5-A7, A10. Allowing petitioner to escape criminal liability in these circumstances would be unjust.

C. The Law-Of-The-Case Doctrine Does Not Apply, But In Any Event It Supports The Government Here

Although petitioner concedes (Br. 14, 19-20, 24) that his argument turns entirely on the government's failure to raise a timely objection at trial, he does not address the settled principles—discussed above—that ordinarily govern such forfeitures. Instead, he urges this Court to embrace (Br. 20) what he calls a "specialized version" of the law-of-the-case doctrine. In his view, the government's failure to object to jury instructions in a criminal case should render those instructions binding in sufficiency-of-the-evidence review. Petitioner's law-of-the-case theory does not present the right analytical framework for considering this issue. But even if it did, the law-of-the-case doctrine would not foreclose an appellate court from taking notice of a plain instructional error in the circumstances present here.

1. The law-of-the-case doctrine has no application here. That doctrine generally posits that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper* v. *United States*, 562 U.S. 476, 506 (2011) (quoting *Arizona* v. *California*, 460 U.S. 605, 618 (1983)). The doctrine "merely expresses the practice of courts generally to refuse to

reopen what has been decided." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.).

In its standard application in the courts of appeals, the law-of-the-case doctrine constrains an appellate court from changing its decision on a matter already decided by that court in a previous appeal in the same case. See 18B *Federal Practice & Procedure* § 4478, at 646 n.16 (2d ed. 2002) (citing cases). But it does not prevent a party from raising—on a first appeal—an issue that had been decided against him only in the trial court. Applying the doctrine in that circumstance would contradict the entire theory of appellate review.

Petitioner seeks to apply his "specialized version" (Br. 20) of the law-of-the-case doctrine to preclude the court of appeals from considering the validity of the jury instructions. But the court of appeals had not previously addressed that issue, and so law-of-the-case principles do not apply. As this Court explained in *United States* v. *Wells*, 519 U.S. 482 (1997), reliance on the "law of the case" doctrine to govern the situation at issue here—based simply on the government's failure to object at trial—involves "something of a misnomer." *Id.* at 487 n.4. Whether to permit appellate review in this situation implicates "an appellate court's relationship to the court of trial." *Ibid.* It does not involve the law-of-the-case principles, which instead "counsel a court to abide by its own prior decision in a given case." *Ibid.*[10]

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[10] See 18B *Federal Practice and Procedure* § 4478.6, at 815 (explaining that law-of-the-case terminology is inappropriate "to address the question whether to deny appellate review of an issue that has not been properly preserved" because "[t]he question is not whether a court should adhere to its own prior ruling without

2. Even if traditional law-of-the-case principles were generally relevant here, they would not support petitioner's "specialized version" of that doctrine (Br. 20). The law-of-the-case doctrine "directs a court's discretion," but it "does not limit the tribunal's power." *Pepper*, 562 U.S. at 506 (quoting *Arizona*, 460 U.S. at 618); see *Messenger*, 225 U.S. at 444. Most importantly, the doctrine "does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice." *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997) (brackets and internal quotation marks omitted) (quoting *Arizona*, 460 U.S. at 618 n.8).

Petitioner's law-of-the-case theory violates those principles because it is mandatory and categorically precludes an appellate court from addressing even the most obvious, inadvertent, and prejudicial instructional errors. See Pet. Br. 26-27 (rejecting established exception to law-of-the-case doctrine for rulings that are plainly wrong and manifestly unjust).

3. Petitioner appears to concede (Br. 20 & n.3) that his version of the law-of-the-case doctrine has little, if anything, to do with the traditional law-of-the-case doctrine previously recognized by this Court. The only independent authority he identifies (Br. 20-24) for his theory is a series of cases from the courts of appeals that use law-of-the-case terminology to require the government to establish the sufficiency of the evidence in light of jury instructions to which the government did not object at trial. Those cases do not help him.

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reexamination, but whether a different court should refuse its ordinary reviewing responsibility to encourage compliance with fair and efficient procedure").

a. Petitioner is correct (Br. 19-24) that various circuits have discussed the issue presented in this case using law-of-the-case terminology. Although the origins of this practice are somewhat opaque, upon closer inspection, petitioner's cited cases ultimately appear to rest on waiver and forfeiture principles.

As one leading treatise explains, "[j]ury instructions present an[] area in which law-of-the-case language is frequently used to express ideas that have nothing to do with law-of-the-case theory." 18B *Federal Practice and Procedure* § 4478.6, at 834. When courts use "law of the case" terminology with respect to unobjected-to jury instructions, therefore, that is "merely one way of phrasing the general principle that a failure to object at the proper time ordinarily bars a later challenge to an instruction and will be considered a form of waiver for purposes of review on appeal." 9C *id.* § 2558, at 179.

To the extent that the circuit decisions that petitioner invokes ultimately turn on waiver and forfeiture principles, no compelling reason justifies the use of inapposite law-of-the-case terminology. Such terminology adds nothing to the analysis other than a high risk of confusion for litigants and courts.

b. In any event, petitioner's circuit decisions do not support his argument. None of the relevant circuits embraces the mandatory law-of-the-case rule that petitioner now urges this Court to adopt. As the government has explained, the First, Fifth, and Eighth Circuits refuse to treat jury instructions as binding law of the case if the instruction is patently erroneous and the crime was correctly charged in the indict-

ment.[11] To the extent that what matters here is the "generally accepted rule" (Pet. Br. 19) in the courts of appeals, that rule—including its plain-error exception—supports the government. Indeed, the court of appeals applied that rule and affirmed petitioner's conviction based on the exception. Pet. App. A5-A7.[12]

4. In any event, a mandatory, no-exceptions version of the law-of-the-case doctrine has little to commend it in this context. Petitioner's policy arguments cannot overcome this Court's precedent permitting an appellee to defend a judgment on grounds not raised below or the express terms of Rule 52(b), see pp. 21-24, *supra*, and they fail on the merits as well.

a. Petitioner argues (Br. 21, 24, 31-32, 36) that his version of the law-of-the-case doctrine is necessary to prevent the government from deliberately changing positions on its way from the trial court to the court of appeals. But even absent such a rule, the government has strong incentives to maintain a consistent litigating position. It also has strong incentives to avoid adding extra elements to the jury instructions. After

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[11] See *United States* v. *Inman*, 558 F.3d 742, 748 (8th Cir.), cert. denied, 558 U.S. 916 (2009); *United States* v. *Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), cert. denied, 546 U.S. 1115 (2006); *United States* v. *Zanghi*, 189 F.3d 71, 79 (1st Cir. 1999), cert. denied, 528 U.S. 1097 (2000); Pet. App. A5-A7 (applying that exception here); see generally Br. in Opp. 12-16 (discussing circuit cases).

[12] The Tenth Circuit has not yet addressed whether to apply such an exception. See Br. in Opp. 15-16 (discussing cases). Notably, however, that court treats "adherence to the law of the case doctrine at the circuit level" not as a matter of binding federal law, but rather as one "left to the discretion of the circuit courts." *United States* v. *Romero*, 136 F.3d 1268, 1272 (10th Cir. 1998). That approach is inconsistent with petitioner's theory that the rule is mandatory and must be applied in all circuits.

all, an instruction that heightens the government's burden of proof at trial increases the chances that the jury will acquit the defendant despite the existence of evidence on every actual element of the crime. In such cases, as petitioner acknowledges (Br. 25), the Double Jeopardy Clause would preclude any re-trial. See *Evans* v. *Michigan*, 133 S. Ct. 1069, 1073-1075 (2013). In the event that the government acquiesces in a jury instruction that increases its burden at trial (perhaps to avoid appellate risk when the law is uncertain), such action inures to the defendant's benefit and promotes judicial efficiency in avoiding unnecessary retrials.

b. Petitioner also argues (Br. 27-28, 31-32, 36) that his forfeiture rule will advance principles of lenity and liberty that are especially salient in the context of criminal prosecutions. But while it is true that this Court applies various criminal-law doctrines in order to zealously protect the constitutional rights of the accused, no such rights are implicated here. As petitioner acknowledges (Br. 33), his proposed rule does not claim "constitutional magnitude." Assessing his conviction under the correct legal standard is entirely consistent with due process of law. See pp. 13-16, *supra*.

Unlike other criminal-law doctrines, petitioner's rule is designed to exonerate the guilty, not to protect the innocent. It entitles a defendant to an acquittal even though (1) the jury was properly instructed with respect to all of the actual elements of the charged offense; (2) the jury unanimously found that petitioner committed that offense; and (3) the evidence in the record was sufficient to support those findings. In those circumstances, the defendant has already re-

ceived an undeserved benefit—an opportunity to have the jury itself vote to acquit him in light of that extra element. The defendant has received a trial that is not merely fair, but actually biased *in his favor*. No reason exists to give the defendant a second chance to obtain a windfall acquittal on appeal.

c. Finally, petitioner argues (Br. 22) that his forfeiture rule is necessary to mitigate potential jury confusion over the relationship between the actual elements and any extra elements incorporated in the instructions. That concern does not support his proposed rule either.

Any such jury confusion would be the product of the instructional error, and it has nothing to do with the sufficiency of the evidence. To the extent the record establishes a plausible basis for such confusion, it might justify granting a new trial—as a result of the instructional error—in accordance with Rule 52(a) or (b). See, *e.g.*, *United States* v. *Zanghi*, 189 F.3d 71, 80 n.11 (1st Cir. 1999), cert. denied, 528 U.S. 1097 (2000). In no event, however, is the appropriate response to petitioner's concerns to grant all defendants in these circumstances an outright acquittal.[13]

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[13] Petitioner speculates (Br. 29-30) that the inclusion of the extra element in this case may have confused the jury and prejudiced its deliberations with respect to the other (correctly stated) elements of the crime. Petitioner raised several versions of that factbound argument in the court of appeals as part of his request for a new trial, and they were rejected. See Pet. App. A5-A10; Pet. C.A. Br. 27-29, 50-54. Petitioner did not object to the isolated references to "exceed[ing] authorized access" at trial, despite his view that the government had already "abandoned" that aspect of the charge through its superseding indictments and various proposed jury instructions. See Pet. Br. 29-30; Pet. C.A. Br. 17-18. Any evidence that would tend to show that petitioner conspired to exceed au-

II. A STATUTE-OF-LIMITATIONS DEFENSE MAY NOT BE SUCCESSFULLY RAISED FOR THE FIRST TIME ON DIRECT APPEAL

Petitioner did not raise a statute-of-limitations defense at or before trial. On appeal, he argued—for the first time—that the indictment was untimely pursuant to the five-year criminal statute of limitations set forth in 18 U.S.C. 3282(a). Although petitioner conceded that a defendant "waive[s]" any statute-of-limitations defense that might involve disputed facts, he asserted that he was entitled to plain-error review because his defense turned on a pure legal defect in the indictment. Pet. C.A. Reply Br. 27-28; see pp. 9-10, *supra*. In this Court, he shifts gears yet again, now arguing (Br. 37-58) that the statute of limitations is a non-waivable jurisdictional constraint and that statute-of-limitations defenses may always be raised for the first time on appeal.

Petitioner's arguments lack merit. As this Court has consistently recognized for more than 140 years, the federal statute of limitations is a non-jurisdictional affirmative defense that becomes part of a case if—and only if—the defendant properly raises it at trial. When the defendant fails to raise that defense, the government has no affirmative obligation to establish compliance with the statute of limitations in the course of the case. The failure to satisfy such a non-existent obligation does not constitute a "plain error." Although it is also appropriate to say that the defendant has "waived" his right to invoke the defense in those circumstances, nothing turns on that label.

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thorized access was probative of his intent to conspire to obtain unauthorized access.

However it is characterized, he may not obtain relief under Rule 52(b). Rather, in circumstances where the defendant has a valid statute-of-limitations defense that his counsel failed to raise through accident or neglect, the proper course is for the defendant to raise an ineffective-assistance-of-counsel claim in a petition for post-conviction relief.[14]

A. The Statute Of Limitations Is A Non-Jurisdictional Affirmative Defense That Must Be Raised By The Defendant

1. The statute of limitations applicable to federal criminal offenses is an affirmative defense that must be raised by the defendant in order to become part of the case. If and when the defense is properly raised, the government bears the burden of proving that the crime was committed within the limitations period. See *Smith* v. *United States*, 133 S. Ct. 714, 721 (2013); *Grunewald* v. *United States*, 353 U.S. 391, 396 (1957). Until then, the government has no burden, and the defense is not in the case at all.

The Court first recognized that principle in *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872). There, an Army paymaster was indicted under a statute making it illegal to embezzle public funds. *Id.* at 171-172. The general statute of limitations imposed a two-year limitations period, but that period did not apply "to any person or persons fleeing from justice." *Id.* at 173. The defendant sought dismissal, arguing that "it appears on the face of the indictment * * * that the crime charged * * * was committed more than two

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[14] The government has previously explained why petitioner's conviction did not violate the statute of limitations. See Br. in Opp. 18-19; Gov't C.A. Br. 61-63.

years before the indictment." *Id.* at 172. He did so by means of a "demurrer"—a form of common-law pleading under which a defendant could argue that the factual allegations in the indictment, taken as true, were nonetheless insufficient to state a claim. See *id.* at 180.

This Court rejected the defendant's argument. The Court explained that when an exception to criminal liability "is not incorporated with the clause defining the offence, nor connected with it in any manner by words of reference," that exception "is not a constituent part of the offence" and the indictment need not allege facts establishing that the exception does not apply. *Cook*, 84 U.S. (17 Wall.) at 181; see *id.* at 173-177. Rather, the Court explained, in such circumstances the exception "is a *matter of defence* and must be pleaded or given in evidence by the accused." *Id.* at 181 (emphasis added). Relying on that analysis, the Court concluded that the federal statute of limitations qualifies as such an "exception" to criminal liability, and thus held that it is a "matter of defence" to be established by the defendant. *Id.* at 177-178, 181.

The Court further held that the defendant could not raise the defense by means of a demurrer, which would deprive the government of its right to rebut the defense by presenting evidence that either (1) the case fell under an exception to the statute of limitations, or (2) the crime in question was in fact committed within the limitations period. *Cook*, 84 U.S. (17 Wall.) at 179-180; see generally *United States* v. *Titterington*, 374 F.3d 453, 454-460 (6th Cir. 2004) (Sutton, J.) (explicating *Cook*), cert. denied, 543 U.S. 1153 (2005). Rather, a defendant would have to raise the defense either by entering a "special plea" before trial (in response to

which the government could introduce its own evidence), or by raising the issue during the trial itself. *Cook*, 84 U.S. (17 Wall.) at 179-180. Either way, the Court emphasized, the government was entitled to respond to the defendant's arguments and to present evidence establishing that the prosecution was timely. *Ibid.*[15]

This Court has repeatedly—and recently—reaffirmed *Cook*'s basic holding that the statute of limitations is an affirmative defense that must be raised by the defendant. In *Biddinger* v. *Commissioner of Police*, 245 U.S. 128 (1917), for example, the Court cited *Cook* and expressly stated that "[t]he statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases." *Id.* at 135. Just three terms ago, this Court cited both *Cook* and *Biddinger* in holding that commission of a federal crime within the limitations period "is not an element" of the offense, and that "*it is up to the defendant to raise the limitations defense.*" *Smith*, 133 S. Ct. at 719-720 (emphasis added).[16]

2. Petitioner argues (Br. 39-48) that the statute of limitations here, 18 U.S.C. 3282(a), is not an affirmative defense that must be raised by the defendant, but

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[15] See generally 2 Joel Prentiss Bishop, *New Criminal Procedure*, §§ 734-743, 775-790, 799-801, at 581-584, 606-613, 618, 622-624 (2d ed. 1913) (discussing special pleas in bar and demurrers); Martin P. Burks, *Pleading and Practice In Actions at Common Law* §§ 197-208, at 328-367 (1913) (same).

[16] The courts of appeals universally agree that the statute of limitations is an affirmative defense that the defendant must raise. See *United States* v. *Franco-Santiago*, 681 F.3d 1, 12-13 & n.18 (1st Cir. 2012) (citing cases); Pet. Br. 40 (conceding as much).

rather a non-waivable jurisdictional limit on the court's authority. That contention fails.

a. Petitioner's argument contradicts this Court's holdings in *Cook*, *Biddinger*, and *Smith*. Those cases establish that any limitations defense must be raised by the defendant before it becomes part of the case. See pp. 34-36, *supra*. That principle is irreconcilable with petitioner's theory that the statute of limitations is a jurisdictional constraint that must be enforced regardless of whether the defendant raises the issue. Indeed, *Cook* rejected the defendant's similar argument that courts have an affirmative duty to dismiss prosecutions brought outside the statute of limitations, either *sua sponte* or "at any stage" and in "any form whatever" that the defect is raised by the defendant. 84 U.S. (17 Wall.) at 170-171 (summarizing defendant's argument); see generally, *e.g.*, *United States* v. *Doyle*, 348 F.2d 715, 718-719 (2d Cir.) (Friendly, J.) (relying on *Cook* to hold that statute of limitations is not jurisdictional), cert. denied, 382 U.S. 843 (1965).

Petitioner acknowledges (Br. 44-46) that his proposed rule conflicts with *Cook* and *Biddinger*. He argues (Br. 44-45) that this Court is not bound by those cases because (1) *Biddinger* involved a differently worded state-law statute of limitations and (2) *Biddinger* and *Cook* both addressed only "anachronistic pleading questions" involving the propriety of raising a limitations defense by demurrer.

Those arguments lack merit. Petitioner does not dispute that *Cook* involved a federal statute of limitations that is identical to the limitations provision at issue here in all relevant respects. Moreover, *Biddinger* itself relied on *Cook*, indicating that any dis-

tinction in the wording of the limitations provisions at issue in those cases was immaterial. *Biddinger*, 245 U.S. at 135. Although both cases involved outdated forms of pleading, that does nothing to undermine *Cook*'s holding that the government bears no affirmative obligation to establish compliance with the statute of limitations in the indictment and that noncompliance "is a matter of defence and must be pleaded or given in evidence by the accused." 84 U.S. (17 Wall.) at 181; see *Titterington*, 374 F.3d at 458-459.

Moreover, petitioner overlooks this Court's recent reaffirmation of *Cook* and *Biddinger* in *Smith*. That case involved the exact statute of limitations at issue here, and it had nothing to do with demurrers or other forms of common-law pleading. Nonetheless, the Court reiterated—yet again—that "it is up to the defendant to raise the limitations defense." *Smith*, 133 S. Ct. at 720. As such, the rule is not of jurisdictional dimension.

b. Petitioner's affirmative case for treating the statute of limitations as a jurisdictional requirement rests on a mistaken analysis of this Court's recent cases analyzing when statutory time limits are jurisdictional. Those cases make clear that statutes of limitations "ordinarily are *not* jurisdictional." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2013) (*Auburn Regional*) (emphasis added). Courts should treat a time bar as jurisdictional "only if Congress has 'clearly state[d]' as much." *United States* v. *Wong*, 135 S. Ct. 1625, 1632 (2015) (brackets in original) (quoting *Auburn Regional*, 133 S. Ct. at 824). And that turns on the "text, context, and relevant historical treatment" of the provision at issue. *Reed Elsevier, Inc.* v *Muchnick*, 559 U.S. 154, 166 (2010).

Nothing in the text, context, or history of Section 3282(a) reflects a clear statement by Congress that its five-year time limit is jurisdictional. Section 3282(a) contains no express reference to the subject-matter jurisdiction of federal district courts. Nor does that provision appear in Chapter 211 of Title 18 of the United States Code, which establishes the rules governing "Jurisdiction and Venue" in criminal cases. Within Chapter 211, Section 3231 grants district courts subject-matter jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. 3231. That provision contains no exception for offenses committed outside the statute of limitations. See *Wong*, 135 S. Ct. at 1633 (noting that Court "has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional").

Petitioner argues (Br. 42-43) that by declaring that "no person shall be prosecuted, tried, or punished" for any offense outside the limitations period, Section 3282(a)'s text constrains the power of courts and prosecutors. 18 U.S.C. 3282(a). But the Fifth Amendment's Grand Jury Clause includes similar language ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."), yet its protections are waivable and non-jurisdictional. U.S. Const. Amend. V; see *Cotton*, 535 U.S. at 630. And a presumption of waiver is a background principle of criminal law that applies "in the context of a broad array of constitutional and statutory provisions." *United States* v. *Mezzanatto*, 513 U.S. 196, 200 (1995); *id.* at 201-202 (collecting cases).

The long tradition of treating criminal statutes of limitations as non-jurisdictional affirmative defenses that the defendant has the option to raise or waive is apparent from *Cook*, *Biddinger*, and *Smith*. It is also clear from *Spaziano* v. *Florida*, 468 U.S. 447 (1984), which held that a capital defendant has a due process right to jury instructions on lesser-included offenses that are time-barred, so long as the defendant waives the statute of limitations applicable to those offenses. *Id.* at 454-457. *Spaziano*'s holding, although involving a state and not a federal statute of limitations, presupposes that a statute-of-limitations defense is non-jurisdictional and subject to waiver.

In addition, criminal defendants sometimes choose to waive statute-of-limitations defenses to serve strategic purposes. For example, a defendant might plead guilty to a time-barred offense in exchange for avoiding a more serious, but timely, charge. *Titterington*, 374 F.3d at 459. A defendant might also waive a statute-of-limitations defense in order to avoid an immediate indictment and extend the period of time available to engage in plea-bargaining. See *United States* v. *Wild*, 551 F.2d 418, 420, 423-425 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); see also, *e.g.*, *United States* v. *Cote*, 544 F.3d 88, 103-104 (2d Cir. 2008) (Sotomayor, J.) (noting other potential benefits of waiver); 5 Wayne R. LaFave et al., *Criminal Procedure* § 18.5(a), at 193 (3d ed. 2007) (citing cases and noting that "[g]ood reason for such an intentional waiver will sometimes exist"). Petitioner's theory that the statute of limitations is jurisdictional would upend that practice—and harm defendants—by making such waivers unlawful.

If Congress had intended to repudiate *Cook* or prevent defendants from waiving limitations defenses, it would have expressly so stated in any of the various amendments it has made to the limitations provision since *Cook* was decided in 1872.[17] No reason exists to upend more than 140 years of precedent treating the statute of limitations as a non-jurisdictional affirmative defense.

B. In No Event May A Statute-Of-Limitations Defense Be Successfully Raised For The First Time On Appeal

Rule 52(b) authorizes appellate courts to consider plain errors that are apparent on the existing record. But no such error exists when a court takes no action to quash an indictment—or overturn a jury verdict—based on a statute-of-limitations defense that the defendant did not raise at trial. On the contrary, the defendant's failure to raise that affirmative defense means that the government was not required to establish its compliance with the statute of limitations in the first place. In these circumstances, it is appropriate to conclude that the defendant has waived the defense, but in any event the government's failure to satisfy a non-existent burden does not qualify as a plain error under Rule 52(b).

1. No "plain error" exists under Rule 52(b) when no statute-of-limitations defense is raised at trial

a. As explained above, Rule 52(b) allows a court to consider a "plain error that affects substantial rights,"

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[17] See, *e.g.*, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, Tit. VI, § 610(a), 117 Stat. 692; Act of Sept. 26, 1961, Pub. L. No. 87-299, § 1, 75 Stat. 648; Act of Sept. 1, 1954, ch. 1214, § 10(a), 68 Stat. 1145; Act of Apr. 13, 1876, ch. 56, 19 Stat. 32-33.

even if it was not properly raised in the lower court. See pp. 23-24, *supra*. An error must be so obvious that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). In assessing whether a "plain error" has occurred, a reviewing court must rely on the "existing record." *United States* v. *Vonn*, 535 U.S. 55, 74 (2002).

In *Cook*, this Court held that the statute of limitations is a "matter of defence" that the defendant must affirmatively raise in order to make it part of the case. 84 U.S. (17 Wall.) at 181. By putting the defense in issue, the defendant requires the government to establish compliance with the statute of limitations. The government then has the "right" to satisfy this burden—in response to the defendant's introduction of the issue—by either (1) showing that one of the statutory exceptions to the statute of limitations exists, or (2) introducing evidence at trial that shows that the crime was committed within the limitations period. See *id.* at 179-180 (explaining that government must have "the right to reply or give evidence, as the case may be, that the defendant * * * within [a statutory] exception," and that government may not be precluded "from giving evidence" at trial "to show that the offence was committed" within the limitations period).[18]

This Court's cases also indicate, however, that when a defendant fails to raise an affirmative defense

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[18] Congress has enacted various exceptions to Section 3282(a)'s general statute of limitations, see generally 18 U.S.C. 3281-3301, including an exception for "[f]ugitives from justice" similar to the one addressed in *Cook*, see 18 U.S.C. 3290.

at trial, the government never assumes the burden of refuting it in the first place.[19] In particular, absent a defendant's having raised a statute-of-limitations defense, the government is not required to establish an exception to the statute or compliance with its time limit. *Cook*, 84 U.S. (17 Wall.) at 179-180. In such circumstances, the government's failure to establish such compliance is not error. Nor is it error for a court to enter a judgment of conviction against the defendant despite the absence of proof that the crime occurred within the limitations period. Neither the government nor the court can be called "derelict," *Frady*, 456 U.S. at 163, in failing to raise an affirmative defense on the defendant's behalf.

b. The analysis set forth above tracks the way affirmative defenses are generally treated in American criminal law. As one treatise explains, "[i]n the context of criminal law defenses," the "burden of introducing a defense for consideration" generally falls on the defendant. 1 Paul H. Robinson, *Criminal Law Defenses* § 3(a), at 12 (1984). Affirmative defenses will generally "not be discussed in a case unless the defendant indicates his interest in raising the issue." *Id.* at 12-13. Requiring the defendant to raise the defense "alert[s] the prosecution to the theory of defense," as "it would be unreasonable to require the prosecution to negate every possible theory of defense, until called to do so." *Id.* § 33(a), at 130 n.2.

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[19] See, *e.g.*, *Dixon* v. *United States*, 548 U.S. 1, 13-14 (2006) (duress; noting the "settled rule" that an indictment need not "negative" an affirmative defense and that "it is incumbent on one who relies on such [a defense] to set it up and establish it") (quoting *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922)); *United States* v. *Sisson*, 399 U.S. 267, 287-288 (1970).

The courts of appeals have recognized that "trial courts generally are under no duty to raise affirmative defenses on behalf of a criminal defendant." *Government of V.I.* v. *Lewis*, 620 F.3d 359, 371 n.10 (3d Cir. 2010). A trial court is not required, for example, to introduce an entrapment or duress defense into the case; that action may alter the structure of the trial and impinge on defense strategy. See *ibid.* ("[B]y raising affirmative defenses *sua sponte*, a trial court might actually harm a criminal defendant by undermining defense counsel's strategic decisions."); see also *United States* v. *Simmonds*, 931 F.2d 685, 688 (10th Cir.), cert. denied, 502 U.S. 840 (1991). The same is true of a limitations defense, which defense counsel may sometimes elect to forgo to avoid prompting the government to conduct additional investigation that may identify additional criminal conduct or lead to distracting litigation on peripheral issues. Because a trial court has no duty to raise affirmative defenses, its failure to do so "is not plain error" for purposes of Rule 52(b). *United States* v. *Montgomery*, 150 F.3d 983, 996 (9th Cir. 1998).[20]

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[20] See, *e.g.*, *United States* v. *Delgado*, 672 F.3d 320, 343 (5th Cir.) (adopting Ninth Circuit's analysis in *Montgomery*), cert. denied, 133 S. Ct. 525 (2012); *United States* v. *Scott*, 642 F.3d 791, 797-798 (9th Cir.) (per curiam) (no plain error not to instruct on affirmative defense because defendant "did not present or rely upon the [defense] theory at trial"), cert. denied, 132 S. Ct. 440 (2011); *United States* v. *Malachowski*, 415 Fed. Appx. 307, 313 (2d Cir. 2011) (no plain error to "fail[] to provide an instruction *sua sponte* on a defense [the defendant] did not even actively advance at trial"); *United States* v. *George*, 448 F.3d 96, 100 (1st Cir. 2006) (adopting *Montgomery*); *United States* v. *Matzkin*, 14 F.3d 1014, 1018 (4th Cir. 1994) ("A finding of plain error when a court failed to sua sponte include an instruction relating to an affirmative defense

In this respect, affirmative defenses differ from legal rules that can be violated by the trial court even absent an objection. Under Rule 52(b), a "legal rule" that governs trial court proceedings can be violated even absent action by the defendant. See *Olano*, 507 U.S. at 733 ("Although in theory it could be argued that if the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review, this is not the theory that Rule 52(b) adopts.") (brackets, citation, and internal quotation marks omitted). But no "legal rule" exists that a trial court has an obligation to raise an affirmative defense that the defendant has not raised. A court thus commits no error by failing to raise such issues *sua sponte*.

c. Even if Rule 52(b) somehow authorized an after-the-fact inquiry into whether the government would have been able to negative a statute-of-limitations defense (had one been raised), a reviewing court would be hard pressed to conclusively resolve that issue in the defendant's favor based on the "existing record." *Vonn*, 535 U.S. at 74. The defendant's failure to raise the defense at trial means that the government would have lacked any incentive to introduce the facts necessary to refute the defense. Because the record was generated at a time when the limitations issue was not part of the case, it could not serve as a reliable guide to resolving that issue. In such circumstances, the record could not provide a sufficient basis by which a reviewing court could find it "plain" or "obvious" that the statute of limitations was violated.

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would place an unnecessary and intolerable burden upon the trial court."); see also *United States* v. *Gutierrez*, 745 F.3d 463, 472-473 (11th Cir. 2014).

Olano, 507 U.S. at 734. No relief under Rule 52(b) would therefore be appropriate.

d. In this case, the court of appeals stated that petitioner had "waived" the statute-of-limitations defense by failing to raise it at trial. Pet. App. A9; see *United States* v. *Franco-Santiago*, 681 F.3d 1, 12 n.18 (1st Cir. 2012) (noting that most courts of appeals likewise consider this a "waiver" and will not grant relief under Rule 52(b) on that basis). That statement simply expresses the legal conclusion that, by choosing to present his case at trial without raising the affirmative defense, and thereby depriving the government of any opportunity to contest that defense, the defendant's actions preclude him from raising the defense for the first time on appeal. See generally, *e.g.*, *United States* v. *Lewis*, 774 F.3d 837, 845 (5th Cir. 2014) (per curiam); *United States* v. *Siegelman*, 561 F.3d 1215, 1232 (11th Cir. 2009) (per curiam), vacated on other grounds by 561 U.S. 1040 (2010). Whether analyzed as a "waiver" or the absence of "plain error" under Rule 52(b), the result is the same.

Below, petitioner conceded that a statute-of-limitations defense should often be treated as "waive[d]" in these circumstances. Pet. C.A. Reply Br. 27. He argued that when a defendant raises that defense for the first time on appeal—and when his claims turns on potentially disputed facts—"it makes sense to find waiver because the Government would be prejudiced by not having been given a chance to establish or rebut the facts." *Ibid.* (citing *Siegelman*, 561 F.3d at 1232, for proposition that "[r]equiring the defendant to assert a limitations defense at trial gives the prosecution a fair opportunity to rebut the defense through additional evidence or during summation").

In this Court, petitioner argues that a "waiver" requires the "intentional relinquishment or abandonment of a known right." Pet. Br. 48 (quoting *Olano*, 507 U.S. at 733). While that is generally the case, it is not always true. See *United States* v. *Broce*, 488 U.S. 563, 573 (1989) (recognizing that "conscious waiver" is not "necessary with respect to each potential defense relinquished by a plea of guilty"); *Doyle*, 348 F.2d at 718-719 (holding that a guilty plea waives any statute-of-limitations defense). As used in the present context, "waiver" refers to extinguishing any right to rely on the affirmative defense because of the failure to raise it, and it thus produces the same conclusion as analysis under Rule 52(b): No error, let alone "plain error," exists.[21]

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[21] Petitioner goes further and argues (Br. 52-53) that the waiver of a statute-of-limitations defense is akin to a waiver of important constitutional rights (such as the right to stand trial, the right to a jury, and the right to testify on his own behalf), and that such a waiver requires "the express and knowing consent of the defendant." That is incorrect. Raising a particular affirmative defense is a strategic decision for counsel to make, akin to the many other tactical and strategic decisions that counsel must make in conducting the defense. See, *e.g.*, *New York* v. *Hill*, 528 U.S. 110, 114-115 (2000) ("[D]ecisions by counsel are generally given effect as to what arguments to pursue * * * . Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.") (citations and internal quotation marks omitted). Counsel "undoubtedly has a duty to consult with the client regarding important decisions, including question of overarching defense strategy," but he "has authority to manage most aspects of the defense without obtaining his client's approval." *Florida* v. *Nixon*, 543 U.S. 175, 187-189 (2004) (citation and internal quotation marks omitted) (holding that concession of guilt at capital trial, in order to focus on the penalty phase, did not require defendant's express approval).

e. Finally, Rule 52's history and purpose confirm that it cannot justify relief on a statute-of-limitations defense raised for the first time on appeal. Adopted in 1944, Rule 52(b) "merely restated existing law" permitting plain-error review in certain circumstances. *Frady*, 456 U.S. at 163 n.13. But before 1944, courts regularly rejected efforts by criminal defendants to raise new statute-of-limitations defenses for the first time after trial or on appeal.[22] Rule 52(b) should be interpreted consistently with that settled practice.

2. Petitioner's theory would deprive the government of its right to introduce evidence

Under petitioner's theory, any criminal defendant is entitled to raise any statute-of-limitations defense on appeal for the first time. Moreover, once the defendant raises that defense, the government bears the burden of establishing compliance with the statute of limitations. See Pet. Br. 55 (arguing that in this case, "[i]t is the government's burden to argue and prove that the superseding indictments relate back, not [p]etitioner's burden to preempt such an anticipated response"). As petitioner once recognized, that approach would "prejudice[]" the government by denying it a fair chance "to establish or rebut the facts." Pet. C.A. Reply Br. 27.

a. Petitioner does not explain how the government can litigate factual issues for the first time on appeal. He does not argue that the trial court should reopen

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[22] See, *e.g.*, *Forthoffer* v. *Swope*, 103 F.2d 707, 709 (9th Cir. 1939); *Capone* v. *Aderhold*, 65 F.2d 130, 131 (5th Cir. 1933); *Evans* v. *United States*, 11 F.2d 37, 39 (4th Cir. 1926); see also *United States* v. *Kaiser*, 138 F.2d 219, 220 (7th Cir. 1943) (entrapment defense), cert. denied, 320 U.S. 801 (1944).

the record to hear evidence of the kind identified in *Cook*, 84 U.S. (17 Wall.) at 179-180. Such reopening would be impossible—the trial is over, the jury has been dismissed, and the case is on appeal. And the court of appeals is not the proper forum in which to introduce new evidence or resolve new factual disputes. See, *e.g.*, *DeMarco* v. *United States*, 415 U.S. 449, 450 n.* (1974) (per curiam). That leaves adjudicating the statute-of-limitations defense on the basis of the existing record, as is standard practice for claims raised under Rule 52(b). See *Vonn*, 535 U.S. at 74.

As explained, see pp. 41-43, *supra*, it would be unfair to require the government to discharge its burden of proof based on a trial record that was developed at a stage in the case where the government did not bear that burden. That result would contradict *Cook*'s holding that the government must have the opportunity to introduce evidence in response to any statute-of-limitations defense raised by the defendant. 84 U.S. (17 Wall.) at 179-180. It would also invite sandbagging, especially in cases involving potentially disputed facts. By waiting to raise a limitations defense, the defendant could prevent the government from developing a factual record to counter that defense.

b. Below, petitioner asserted that his own statute-of-limitations defense does not implicate these concerns, because it does not involve "disputed facts" but rather "a question of law premised on the face of the charging instrument." Pet. C.A. Reply Br. 28. That argument is in serious tension with *Cook*, which makes clear that the government has the right to introduce evidence even when the indictment appears to allege a

crime that took place outside the statute of limitations. 84 U.S. (17 Wall.) at 173-181.

Recognizing a narrow exception for legal claims resting on undisputed facts would also be hard to administer. Statute-of-limitations defenses will often turn on disputed factual issues, and courts would thus have to develop a complicated new jurisprudence aimed at distinguishing legal claims, factual claims, and claims raising mixed questions of law and fact. That approach would necessarily require "case-by-case determination[s]" that "would leave defendants"—and courts—"without a clear rule as to when a statute of limitations defense must be raised. *Lewis*, 774 F.3d at 845.[23]

This case offers a perfect illustration of the problems with adopting petitioner's theory. Although petitioner asserts that his case involves a pure question of law and undisputed facts, he overlooks that the statute-of-limitations issue here ultimately depends on whether the second superseding indictment relates back to the original indictment. That question turns, in part, on whether the former's reference to "Exel

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[23] And if petitioner were correct that his claim were solely legal, it might implicate Federal Rule of Criminal Procedure 12. At the time of his trial, Rule 12 provided that a defendant "waive[s]" any challenge to a "defect in the indictment" or to a "defect in instituting the prosecution" unless that challenge is raised in a pre-trial motion. See Fed. R. Crim. P. 12(b)(3) and (e) (2013); *United States* v. *Baldwin*, 414 F.3d 791, 795 n.2 (7th Cir. 2005) (noting circuit split over whether Rule 12(b)(3) encompasses statute-of-limitations defenses and whether plain-error review is available if such defenses are not timely raised). The government has not invoked Rule 12 in this case, and the court of appeals did not address whether it applies.

email accounts of Exel President and Exel legal counsel" is (as petitioner asserts) broader than the latter's reference to "Exel Server." Pet. App. A2; see pp. 3-4, 9, *supra*; Br. in Opp. 18-19; Pet. C.A. Br. 49. The proper resolution of that dispute turns on a factual issue—the relationship between the "Exel server" and the identified email accounts—that the parties had no reason to litigate at trial.

As this case shows, any rule that requires case-by-case determinations about the nature of the statute-of-limitations defense will be subject to manipulation and spur confusion among litigants and in the lower courts. This Court should instead apply a clear, easily administrable rule requiring all statute-of-limitations defenses to be raised at or before trial.

3. Petitioner's reliance on* Wood *and* Day *is misplaced

Petitioner invokes (Br. 49-52) *Wood* v. *Milyard*, 132 S. Ct. 1826 (2012) and *Day* v. *McDonough*, 547 U.S. 198 (2006), to support his argument that a criminal defendant can raise a statute-of-limitations defense for the first time on appeal. In those cases, this Court recognized that federal courts may consider, *sua sponte*, a state government's statute-of-limitations defense to a petition for habeas corpus challenging a state criminal conviction—even if the state government neglected to raise that defense in the district court. *Wood*, 132 S. Ct. at 1834-1835; *Day*, 547 U.S. at 201-202.

Neither *Wood* nor *Day* advances petitioner's argument here. In those habeas cases, this Court declined to apply the forfeiture rule that applies in ordinary civil litigation in order to maintain consistency with the Court's prior treatment of other "threshold constraints on federal habeas petitioners." *Day*, 547

U.S. at 209; see *Wood*, 132 S. Ct. at 1832-1834. It emphasized that allowing courts to address forfeited limitations defenses *sua sponte* would advance basic interests in federal-state comity and the finality of state-court criminal judgments that are implicated by federal habeas corpus review of state-court judgments. *Ibid.* The Court noted that allowing courts to raise such issues on their own would not violate any "[r]ule, statute, or constitutional provision," and it indicated that the belated defense could not be raised if the "delayed focus on the limitation issue" prejudiced the habeas petitioner. *Day*, 547 U.S. at 210-211; see *Wood*, 132 S. Ct. at 1834

None of those considerations applies to the situation at issue here. This case involves the direct appeal of a federal criminal conviction, and it does not implicate habeas corpus procedures or federal-state relations in any way. In this context, Rule 52(b) sets forth the only mechanism by which defendants may seek appellate review of purported trial errors to which he did not object below—and federal courts have "no authority" to create exceptions to that rule. *Johnson*, 520 U.S. at 466; cf. *Nguyen* v. *United States*, 539 U.S. 69, 80 (2003) (invalidating decision of improperly composed court of appeals without resort to plain-error rule). Moreover, longstanding precedent makes clear that it is improper for a court to uphold a statute-of-limitations defense without giving the government an opportunity to introduce evidence—including, if necessary, at trial—establishing compliance with the applicable statutes. See *Cook*, 84 U.S. (17 Wall.) at 179-180. Petitioner is therefore wrong to suggest (Br. 49) that *Wood* and *Day* "necessarily control" the issue in this case.

4. Federal post-conviction proceedings provide an adequate mechanism for addressing statute-of-limitations defenses not raised due to ineffective assistance of counsel

This case involves whether a criminal defendant may successfully raise a statute-of-limitations defense—for the first time—in the direct appeal of his criminal conviction. For the reasons explained above, he may not. But nothing prevents a defendant from raising such a defense in the context of a collateral challenge to his conviction alleging the ineffective assistance of his trial counsel. If the defendant can show that (1) his trial counsel was deficient in failing to raise that defense, and (2) the deficiency was prejudicial, he will be entitled to a reversal of his conviction. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984); *United States* v. *Coutentos*, 651 F.3d 809, 818 (8th Cir. 2011) (granting relief on such a claim).

Litigating the statute-of-limitations defense in a post-conviction proceeding would provide significant advantages over doing so in a direct appeal. Most importantly, the proceeding would take place in a federal district court, and the parties would have the opportunity to develop a full factual record on (1) the reasons the limitations defense was not raised at trial in the first instance (*i.e.*, whether it was accidentally forfeited or deliberately waived), and (2) whether that defense would have succeeded on the merits. See generally *Massaro* v. *United States*, 538 U.S. 500, 504-506 (2003) (noting advantages of post-conviction review when trial proceedings were not directed to the matter at issue).

That approach would enhance the accuracy and reliability of any final decision, remain faithful to the

dictates of Rule 52(b), and uphold the government's right—under *Cook*—to present evidence showing why the defendant's limitations argument would fail. No reason exists to modify Rule 52(b), or settled waiver principles applicable to the failure to raise an affirmative defense, in order to provide relief for a claimed (but not previously raised) limitations defense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 371 (2006) provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. 18 U.S.C. 1030 (2006) provides:

Fraud and related activity in connection with computers

(a) Whoever—

(1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or

foreign relations, or any restricted data, as defined in paragraph y. of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains—

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer if the conduct involved an interstate or foreign communication;

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period;

(5)(A)(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and;

(B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused (or, in the case of

an attempted offense, would, if competed, have caused)—

(i) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value;

(ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

(iii) physical injury to any person;

(iv) a threat to public health or safety; or

(v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security;

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if—

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States;[1]

(7) with intent to extort from any person any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to cause damage to a protected computer;

shall be punished as provided in subsection (c) of this section.

(b) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is—

(1)(A) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

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[1] So in original. Probably should be followed by "or".

(2)(A) except as provided in subparagraph (B), a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), (a)(5)(A)(iii), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or an attempt to commit an offense punishable under this subparagraph, if—

(i) the offense was committed for purposes of commercial advantage or private financial gain;

(ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or

(iii) the value of the information obtained exceeds $5,000; and

(C) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(3)(A) a fine under this title or imprisonment for not more than five years, or both, in the case of an offense under subsection (a)(4) or (a)(7) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(4), (a)(5)(A)(iii), or (a)(7) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(4)(A) except as provided in paragraph (5), a fine under this title, imprisonment for not more than 10 years, or both, in the case of an offense under subsection (a)(5)(A)(i), or an attempt to commit an offense punishable under that subsection;

(B) a fine under this title, imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(5)(A)(ii), or an attempt to commit an offense punishable under that subsection;

(C) except as provided in subparagraph (5), a fine under this title, imprisonment for not more than 20 years, or both, in the case of an offense under subsection (a)(5)(A)(i) or(a)(5)(A)(ii), an attempt to commit an offense punishable under either sub-

section, that occurs after a conviction for another offense under this section; and

(5)(A) if the offender knowingly or recklessly causes or attempts serious bodily injury from conduct in violation of subsection (a)(5)(A)(i), a fine under this title or imprisonment for not more than 20 years, or both; and

(B) if the offender knowingly or recklessly causes or attempts to cause death from conduct in violation of subsection (a)(5)(A)(i), a fine under this title or imprisonment for any term of years or for life, or both.

(d)(1) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section.

(2) The Federal Bureau of Investigation shall have primary authority to investigate offenses under subsection (a)(1) for any cases involving espionage, foreign counterintelligence, information protected against unauthorized disclosure for reasons of national defense or foreign relations, or Restricted Data (as that term is defined in section 11y of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)), except for offenses affecting the duties of the United States Secret Service pursuant to section 3056(a) of this title.

(3) Such authority shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section—

(1) the term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) the term "protected computer" means a computer—

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or

(B) which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States;

(3) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States;

(4) the term "financial institution" means—

(A) an institution, with deposits insured by the Federal Deposit Insurance Corporation;

(B) the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank;

(C) a credit union with accounts insured by the National Credit Union Administration;

(D) a member of the Federal home loan bank system and any home loan bank;

(E) any institution of the Farm Credit System under the Farm Credit Act of 1971;

(F) a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934;

(G) the Securities Investor Protection Corporation;

(H) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); and

(I) an organization operating under section 25 or section 25(a)[2] of the Federal Reserve Act;

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[2] See Reference in Text note below.

(5) the term "financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(6) the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;

(7) the term "department of the United States" means the legislative or judicial branch of the Government or one of the executive departments enumerated in section 101 of title 5;

(8) the term "damage" means any impairment to the integrity or availability of data, a program, a system, or information;

(9) the term "government entity" includes the Government of the United States, any State or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country;

(10) the term "conviction" shall include a conviction under the law of any State for a crime punishable by imprisonment for more than 1 year, an element of which is unauthorized access, or exceeding authorized access, to a computer;

(11) the term "loss" means any reasonable cost to any victim, including the cost of responding to an

offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service; and

(12) the term "person" means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity.

(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in cause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B). Damages for a violation involving only conduct described in subsection (a)(5)(B)(i) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design

or manufacture of computer hardware, computer software, or firmware.

(h) The Attorney General and the Secretary of the Treasury shall report to the Congress annually, during the first 3 years following the date of the enactment of this subsection, concerning investigations and prosecutions under subsection (a)(5).

3. 18 U.S.C. 3282 provides:

Offenses not capital

(a) IN GENERAL.—Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

(b) DNA PROFILE INDICTMENT.—

(1) IN GENERAL.—In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.

(2) EXCEPTION.—Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to—

(A) the limitations period described under subsection (a); and

(B) the provisions of chapter 208 until the individual is arrested or served with a summons in connection with the charges contained in the indictment.

(3) DEFINED TERM.—For purposes of this subsection, the term "DNA profile" means a set of DNA identification characteristics.

4. 18 U.S.C. 3290 provides:

Fugitives from justice

No statute of limitations shall extend to any person fleeing from justice.

5. Fed. R. Crim. P. Rule 12 (2013) provides:

Pleadings and Pretrial Motions

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, ob-

jection, or request that the court can determine without a trial of the general issue.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment of information—but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

(4) Notice of the Government's Intent to Use Evidence.

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule

12(B)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding motion, the court must state its essential findings on the record.

(e) Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusion of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be release or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

6. Fed R. Crim. P. Rule 12 provides:

Pleadings and Pretrial Motions

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made at Any Time. A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) Motions That Must Be Made Before Trial. The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) a defect in the indictment or information, including;

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

(C) suppression of evidence;

(D) severance of charges or defendants under Rule 14; and

(E) discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) Setting the Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

If the court does not set one, the deadline is the start of trial.

(2) Extending or Resetting the Deadline. At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) Consequences of Not Making a Timely Motion Under Rule 12(b)(3). If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding motion, the court must state its essential findings on the record.

(e) [Reserved]

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant

to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

7. Fed. R. Crim. P. Rule 51 provides:

Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court— when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

8. Fed. R. Crim. P. Rule 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

9. Act of Apr. 40, 1790, § 32, 1 Stat. 119 provides:

SEC. 32. ***And be it further enacted***, That no person or persons shall be prosecuted, tried or punished for treason or other capital offence aforesaid, willful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid shall be done or committed; nor shall any person be prosecuted, tried or punished for any offence, not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid: *Provided*, That nothing herein contained shall extend to any person or persons fleeing from justice.

Supreme Court, U.S.
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No. 14-1095

In The
Supreme Court of the United States

MICHAEL MUSACCHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Misapplying civil standards to this criminal-law application of law of the case, the Government ignores the role of the jury, the broad consequences of the district court having instructed it on particular elements, and the Government having obtained a verdict on those elements that is not supported by sufficient evidence. It is the jury that is the focus here, not some narrower alternative theory that could have been, but was not, presented as the framework

for conviction. Where the Government has not objected and the jury deliberates on particular elements, required or not, its verdict must be measured against those elements.

As for review of an inadvertently forfeited limitations bar, both sides agree that review is inevitable – at latest in a habeas proceeding claiming ineffective assistance of counsel. Waiting for that last opportunity makes no sense and multiple theories of review support allowing a limitations bar to be raised on direct appeal.

I. Sufficiency of the Evidence for a Conviction Must Be Measured Against the Elements of a Crime as Instructed to the Jury without Government Objection.

Where the Government acquiesces to the jury deliberating under instructions including a particular theory and elements, the jury's resulting verdict of conviction must be tested on the elements as instructed in order to determine whether there was sufficient evidence for the jury *rationally* to reach that verdict. If there was not sufficient evidence, there necessarily was a problem with the jury, the instructions, or both. Whether the instructions went beyond the statutory minimum elements is irrelevant to the interests served and the conclusions drawn from sufficiency review and is irrelevant to the other interests served by the law-of-the-case doctrine in this context.

Although the conjunctive elements of the jury instruction in this case went beyond the disjunctive terms of the statute, such instruction was hardly unforeseeable or arbitrary. The Government pursued

this case as involving a conspiracy *both* to access a computer "without authorization" *and* to "exceed authorized access." The Superseding Indictments continued to allege, though not charge, conspiracy for both types of access, and the Government's arguments and witnesses erroneously sought, though failed, to establish the "exceeding" element. Pet. Br. 6-10, 29-30. The issue so permeated the case that the Government itself noted post-trial that Petitioner "does not understand" that the formal conspiracy charge had abandoned the "exceeding" claim (if not the allegations). Gov't Opp. to Def. Supp. Motion for Judgment of Acquittal, Aug. 30, 2013, at 2 [Doc. 203, PageID 1219].

Contrary to the Government's claims, U.S. Br. 6 n. 2, the conjunctive instruction was neither an inexplicable clerical error nor a windfall to Petitioner. Rather, it was the natural, if erroneous, result of the manner in which the Government tried this case. Indeed, the instruction is an almost verbatim recitation of the allegations in the Second Superseding Indictment.[1]

Having gotten the benefit of painting with the broad brush of the combined crimes – piling on, as it were – the Government now seeks to be excused from needing sufficient evidence for the theory as presented to the jury because, it claims, such allegations, arguments, and witnesses were superfluous. But it is impossible to demonstrate they were superfluous to

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[1] *Compare* JA 168 (Jury Charge), *with* JA 92-93 (Second Superseding Indictment: object, manner, and means of the conspiracy).

the *jury*, and it is impossible to demonstrate that simply ignoring the added "exceeding" element, and the lack of sufficient evidence for it, is harmless beyond a reasonable doubt.

A. Applying the Elements as Instructed to the Jury Is the Only Means of Serving the Interests of the Law-of-the-Case Doctrine and of Sufficiency Review.

The various interests supporting the law-of-the-case doctrine at issue here, Pet. Br. 21-22, 32-35, only work if the baseline for sufficiency of the evidence is what the jury was actually instructed to do. Measuring sufficiency *exclusively* against the elements in the statute regardless what the jury was told, as the Government would do, makes the entire exercise and the jury's involvement rather pointless. Although criminal statutes certainly establish the minimum elements *necessary* for a conviction – and law of the case cannot reduce such elements – they do not define the maximum or *sufficient* elements for a particular conviction, which might change based on the Government's action or inaction in the case. Indeed, every circuit court to consider the issue agrees with the general proposition that the Government's conduct *can* increase the burdens it must meet in order to convict a defendant. Pet. Br. 20-24.

None of the cases cited by the Government, at 14-15, says otherwise. *Jackson v. Virginia*, 443 U.S. 307, 314-15 (1979), discusses sufficiency review in terms of the elements of the offense or crime "charged," rather than merely the elements set forth

in the statute.[2] Indeed, the discussion in *Jackson* focuses on whether the jury could have rationally reached the result it did or whether it may have failed to apply the proper constitutional standard of proof beyond a reasonable doubt. Those inquiries turn on what the jury was in fact asked to do, not on some lesser instruction that it might otherwise have been given. Regardless whether the "exceeding" element was required by statute, if the jury found such element without sufficient evidence, that reflects the exact same problems in applying the reasonable doubt standard that insufficient evidence for any other element would suggest. The necessary conclusion from such a result is that the jury was confused, irrational, or acted improperly. Ignoring that conclusion because the element was not required at the outset only sweeps the due process concerns under the rug. While sufficiency review does not inquire into the *ac-*

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[2] *Whalen v. United States*, 445 U.S. 684, 689 (1980), states the truism that courts may not impose punishments not authorized by Congress because to do so would, *inter alia*, trench "particularly harshly on individual liberty." That confirms that a statute sets the *minimum* elements necessary for conviction, but says nothing about whether government conduct can raise the bar further. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986), likewise does not state that charged elements not required by statute can be ignored. The issue in *McMillan* was whether the Government was *required* to include as additional elements facts that increase the severity of punishment. This Court held that it was not so required, though that conclusion was limited by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and later overruled by *Alleyne v. United States*, -- U.S. --, 133 S. Ct. 2151, 2163-63 (2013). In any event, the case said nothing about the consequences of instructing the jury on elements beyond the minimum required.

tual reasoning of the jury, such review nonetheless represents a safety net to ensure the outcome is at least possible.

The Government's reliance, at 15, on *United States v. Powell*, 469 U.S. 57, 61-69 (1984), is particularly misplaced. The jury in *Powell* convicted on one count and acquitted on another, yet the conviction was predicated on the same conduct for which the defendant was acquitted in the second count. This Court nonetheless upheld the conviction despite the seeming inconsistency because they were separate counts and the disparate results could have been a product of leniency or mercy on the second count rather than confusion or impropriety. Here, by contrast, the jury convicted based on an unsupported element within a single conspiracy count, a result that cannot be explained away as an act of leniency. Rather, the jury was either confused or failed to properly apply the presumption of innocence and the beyond-a-reasonable-doubt standard. A jury ignoring instructions in order to be merciful presents no due process concern; one ignoring or misapplying them to convict poses precisely the type of due process concern supporting sufficiency review regardless whether, unbeknownst to the jury, an instructed element was not necessarily required by the statute.[3]

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[3] Ensuring "notice and a meaningful opportunity to defend," U.S. Br. 14, likewise is best served by looking to the elements actually given in the jury instructions. At a minimum, the inclusion of the "exceeding" issue in the case and instructions diverted significant defense time and attention. For the Government to repudiate accountability for such issue after the jury has considered it is a bait and switch that offends the values of both notice and a meaningful opportunity to defend.

The Government claims, at 16-17, 21-22, that it may defend a judgment of conviction on any alternative ground and is not stuck with the theory presented to the jury. That position ignores the non-usurpable role of the jury in determining guilt in criminal cases. Unlike in civil cases or sentencing issues, a court may *not* enter summary judgment or a directed verdict in favor of the prosecution. Only a defendant may obtain a court-directed judgment of acquittal. *Cf. Burks v. United States*, 437 U.S. 1, 16 (1978) (Government's case so lacking that court should have directed an acquittal). While sufficient evidence of all statutory elements is a *necessary* condition to uphold a conviction, it is not a *sufficient* condition such that a court could preemptively adjudicate a defendant's guilt. Civil or sentencing cases thus are inapposite. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 513 (1988) (where no liability as a matter of law under new theory, no need for a remand; erroneous jury instructions cannot create liability where none is authorized); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (O'Connor, J., plurality opinion) (issue was preserved by motions for summary judgment and JNOV, failure to separately raise same objection to jury instructions does not bar review of motions for judgment); *compare* FED. R. CIV P. 50 (either party may seek judgment as a matter of law), *with* FED. R. CRIM. P. 29 (only defendant may seek judgment).[4]

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[4] *See also Greenlaw v. United States*, 554 U.S. 237, 249-50 (2008) (sentencing determined by the judge may be challenged or defended by either party); *Giordenello v. United States*, 357 U.S. 480, 487-488 (1958) (declining to rule on alternative ground

B. The "Plainness" of Error in a Jury-Instruction Does Not Support a Law-of-the-Case Exception.

The Government does not meaningfully dispute that the plain-error exception applied by the Fifth and First Circuits makes no sense when compared to the uniformly accepted general rule regarding extra-statutory elements in an indictment or the inclusion in the instructions of added elements that are not *plainly* erroneous. Pet. Br. 24-32.

Instead it merely reiterates earlier arguments, already addressed, suggesting that an instructional error should not be perpetuated at the sufficiency stage, and draws incorrect analogies to civil cases and alternative grounds to affirm. U.S. Br. at 20-22. The Government's related claim, at 22-23 that there can be no estoppel in determining the correct rule of law again misses the point that the Government as prosecutor stands in a different position from civil litigants or criminal defendants. Indeed, the Government effectively estops itself from relying on certain legal theories in criminal cases whenever it fails to indict on a particular charge or theory. This situation is no different – whether the Government *could have* argued a more favorable theory of criminal culpability to the jury, it painted this case with a broader brush and did not object when the instructions simply followed what it had been doing all along.[5]

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defending improperly seized and admitted evidence but allowing such argument to be raised on retrial).

[5] The civil cases cited by the Government, at 22-23, do not say otherwise. *See, e.g., United States Nat'l Bank of Or. v. Inde-*

The Government, at 23-24, next renews its argument that Rule 52(b) plain-error review is available to allow it and the courts to ignore the instruction given below. Plain-error review is not available to the Government in the circumstances here. Pet. Br. 27-32. Furthermore, allowing the novel expansion of Rule 52(b) suggested by the Government would run counter to this Court's recognition of the circumscribed nature of the rule. *Johnson v. United States*, 520 U.S. 461, 466 (1997); *United States v. Olano*, 507 U.S. 725, 731-35 (1993).[6] At most the government might invoke harmless error under Rule 52(a), but the standards are more stringent and there is no prospect that the Government could satisfy those standards here. Indeed, *Olano*, 507 U.S. at 741; *id.* at 741-

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pendent Ins. Agents of Am., Inc., 508 U.S. 439, 447 (1993) (holding that court not required to issue an advisory opinion based on a hypothetical agreed to by the parties).

[6] The circuit case the Government cites, at 24, for application of plain-error review in favor of the Government is easily distinguished. The discussion of Rule 52(b) in *United States v. Jackson*, 207 F.3d 910, 917 (7th Cir.) (Posner, J.), *vacated on other grounds*, 531 U.S. 953 (2000), is *dicta* multiple times over, as plain error was never argued by the Government and the claimed error was neither plain nor even error. Furthermore, the case involved the admissibility of evidence, which is a question for the court, and hence correcting an erroneous theory of admissibility if there were some other basis to admit the same evidence would have no bearing on the jury's deliberations. Admissibility is a purely procedural question and review in such circumstances is not for plain error, but rather for harmless error or, indeed, no error at all. The additional circuit cases *Jackson* cites as applying plain-error review for the Government all involve sentencing issues, which again are matters for the court, can be determined as a matter of law, and do not bear upon the jury's deliberations or determination of guilt.

42 (Kennedy, J., concurring), amply illustrates the significant impact of the burden under harmless error analysis.[7]

As for the interests of justice, allowing the Government to save the result of a verdict no rational jury could have reached consistent with its instructions would undermine, not enhance, the fairness, integrity, and public reputation of the courts by appearing results-oriented and dismissive of the role of the jury. The cases cited by the Government do not hold that reversing a conviction would constitute a miscarriage of justice for purposes of Rule 52(b). In both *Johnson v. United States*, 520 U.S. at 469-70, and *United States v. Cotton*, 535 U.S. 625, 634 (2002), this Court addressed whether defendants, not the Government, had satisfied the plain-error test. This Court in both cases concluded that defendants had not because the errors were harmless and hence did not create a miscarriage of justice. As an aside, this Court observed, in *dicta*, that reversing a conviction or substantially lowering a mandatory minimum sentence based on a harmless error would likely encourage abuse and provoke public ridicule.

Such *dicta* falls far short of a holding that enforcing against the Government the consequences of its choices would constitute a miscarriage of justice. The jury in this case reached a verdict that could not be supported by the instructions and evidence it was given. And the Government's hands are far from

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[7] Also, problems with the application of the reasonable-doubt standard would not be deemed harmless in any event. *Jackson v. Virginia*, 443 U.S. at 320 n. 14.

clean given that the instruction now causing it problems echoed its own indictment and arguments regarding a conspiracy aimed at both forms of access. There is nothing unjust about entering an acquittal when the Government was incapable of proving the conjunctive crime it alleged, the conjunctive crime it tried, and the conjunctive crime as instructed to the jury without objection. That it could have, and perhaps should have, done a better job settling on a narrow theory and sticking to it, rather than continuing to try the case under a theory it ultimately could not support, does not make the failure of its case "unjust"; it makes it appropriate.

Contrary to the Government's suggestion, at 25-26, the outcome of this case was far from inevitable absent the extra element, and the Government certainly could not meet its burden to demonstrate harmlessness beyond a reasonable doubt. The Government reaped substantial benefits from its decision to litigate this case as involving both forms of access, rather than limiting the purported conspiracy to the narrower access "without authorization." With the burden of proving harmlessness beyond a reasonable doubt on the Government, the best that can be said is that there is uncertainty regarding what the jury did and what the jury would have done under a different instruction. While such uncertainty may defeat a claim of prejudice when the burden is on Petitioner, it equally defeats a claim of harmlessness when the burden is on the Government. Pet. Br. 28-31.

The Government's renewed citation, at 27, to *United States v. Wells*, 519 U.S. 482, 487-89 (1997), to claim that the law-of-the-case doctrine is a discre-

tionary matter within the circuits continues to be misguided. *See* Pet. Br. 19-20 n. 2 (discussing *Wells*). *Wells* rejected a previously unraised law-of-the-case argument as insufficient to oust this Court's own authority to decide an issue raised and decided below, and preserved without objection in the Petition. That result had more to do with the procedural posture of the case and the last minute attempt to torpedo a question properly granted by this Court. *Wells* does not represent a general comment on whether the law-of-the-case doctrine can bind the Government when properly raised and argued.[8]

Turning to the narrow question actually presented in the Petition – whether the plain-error exception to the otherwise generally accepted law-of-the-case rule makes any sense – the Government, at 29-30, offers little substantive defense of that exception. It does not dispute the widespread acceptance of the general rule; it does not dispute that errors in jury instructions have as much or more claim to the rule as errors in the indictment; and it does not dispute that the failure to object to a "plain" error should be held against it more than failure to object to a debatable error. Furthermore, the Government eventually admits, at 31, that it may well acquiesce in instructions that increase its burdens when it finds that tactic useful. Such admission, however, is difficult to reconcile with the Government's other arguments here,

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[8] The Government's citation, at 12, 26, 28, to *Agostini v. Felton*, 521 U.S. 203 (1997), *Pepper v. United States*, 562 U.S. 476 (2011), and *Arizona v. California*, 460 U.S. 605 (1983), adds nothing to its argument and ignores the discussion of those cases in Petitioner's opening brief, at 25-26.

and hence it is hard to imagine why it should be permitted to revoke such acquiescence now where the result is not to its liking.[9]

Petitioner seeks to enforce the burden to which the Government acquiesced and which the jury wrongly found was satisfied. The jury should have acquitted on the conspiracy count on this record and the instructions it was given, yet did not do so. The conviction not supported by sufficient evidence was a windfall to the Government, not Petitioner. The Government should not now get the further benefit of a reduced baseline for sufficiency review. The proper course is to evaluate the evidence according to the instructions given and, if insufficient to support the verdict, to acquit on the conspiracy charge, as the jury itself should have done. Merely ordering a new trial, as the Government suggests, would give it a second bite at the apple, would reward it for a problem partly of its own making, and would be contrary to basic principles of double jeopardy. If the Government cannot turn square corners when seeking to take away the liberty of its citizens, then it should be required to live with the natural consequences of such failures.

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[9] The Government, at 32 n. 13, seeks to lay the lack of objection to the instructions at Petitioner's feet, arguing that his counsel could have objected to the introduction of the "exceeding" issue at trial. But the Government itself noted below that trial counsel was also misled. *Supra* at 3. And trial counsel is not responsible for saving the Government from the consequences of its tactical decisions. Here Petitioner merely argues the Government must take the bad with the good. It was able to introduce the exceeding issue, but now its conviction must be judged according to the instruction as given on that issue.

II. A Statute-of-Limitations Bar Not Raised at or Before Trial Is Reviewable on Appeal.

Both sides agree that review of a forfeited statute-of-limitations bar is inevitable; the only question is how much time will pass before a court actually hears the issue. As the Government correctly concedes, if not raised now, the limitations issue will form the basis for an ineffective assistance challenge. U.S. Br. at 34, 53; *see* Pet. Br. 56-57.

Given such inevitable review, the entire doctrinal justification for the waiver rule in the Fifth Circuit and elsewhere vanishes. A waiver that violates an attorney's duty of care – and hence a defendant's right to counsel – cannot possibly be deemed effective. Ample reasons favor addressing the issue sooner rather than later, there is no reason why delay would be valuable, and the Government's concern with having a fair opportunity to respond can be addressed in far more sensible ways.

The baseline question for this Court is whether a limitations bar can waived by mere inadvertence. Pet. Br. 38. If the answer is "no," the decision below must be vacated and remanded for consideration of the merits of the limitations bar. Multiple theories support that conclusion, and it matters not to this case whether the Court adopts the narrow plain-error approach, the broad jurisdictional approach, or one of the middle approaches – requiring either an affirmative waiver or concluding that the congressional policy choice may not be rejected by the parties, even if not jurisdictional. Each approach leads to the same result here.

Given that the Government barely responds to the middle approaches, Petitioner will start with those.

A. As a Substantive Constraint on Government, the Limitations Bar in § 3282(a) Should Be Non-Waivable or Require a Knowing and Voluntary Waiver.

As Petitioner has noted, the limitations bar contained in 18 U.S.C. § 3282(a) embodies a substantive congressional restriction on government and an important substantive right for defendants that either cannot be waived at all or can only be waived intentionally. Pet. Br. 39-40, 46-48, 49-53.

This Court's decision in *Nguyen v. United States*, 539 U.S. 69, 80 (2003), supports the non-waivable approach and its decisions in *Wood v. Milyard*, -- U.S. --, 132 S. Ct. 1826 (2012), and *Day v. McDonough*, 547 U.S. 198 (2006), support the intentional waiver approach. The Government offers no credible response to either.

The Government has no response to this Court's non-waivability analysis in *Nguyen*. Indeed, it actually cites *Nguyen*, at 52, for the proposition that courts may not create exceptions to congressional commands. Petitioner agrees – which means there can be no implied or court-made exception to the express command of the limitations bar in § 3282(a).

Regarding the intentional-waiver analysis in *Wood* and *Day*, the Government minimally argues that the limitations period for habeas is a "threshold constraint" on habeas petitioners. U.S. Br. at 51-52. But exactly the same is true of the limitations bar in

§ 3282(a). Indeed, while the limitations period for habeas proceedings is *expressly* made an affirmative defense by the rules and the burden is squarely on the State to raise it at the outset, the same is not true of limitations arguments raised against criminal prosecutions. Pet. Br. 50-51. On every measure, the case supporting an inadvertent waiver is stronger in the habeas context than it is here, yet this Court refused to adopt that approach. *Id.*[10]

Regarding the need for an actual waiver to be knowing and intentional, the Government, at 47, only quibbles with what constitutes a valid intentional waiver. It is irrelevant to this case whether a waiver must be made by trial counsel, by defendant himself, by allocution, or by implication from other intentional conduct such as pleading guilty. There is no dispute that Petitioner and his counsel did none of those things. There was inadvertence, nothing more.

The Government's repeated concern, at 48-50, that it have an opportunity to introduce evidence if necessary to rebut a limitations bar is an question of remedy and procedure, not of whether the bar can be

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[10] The Government's invocation, at 52, of federal-state comity as distinguishing *Wood* and *Day* is curious given that for the vast majority of our history there was *no* limitations period for habeas petitions. Pet. Br. 51. In any event, a defendant's interest in invoking the Great Writ and the law's long-standing solicitude towards persons charged with crimes at least rivals and generally outweighs such comity concerns. Indeed, the Government's own observation, at 52, that *Day* would preclude late assertion of a limitations bar if it prejudiced the habeas petitioner makes clear that the prisoner's rights take precedence over concerns for comity. 547 U.S. at 210-11.

raised at all. In most instances the indictment or the existing record will be sufficient to resolve the issue.

In this case, the substance of the limitations issue is not yet presented, only the reviewability of that issue *vel non*, and the merits of the limitations bar can be addressed in the first instance on remand. Cert. Reply 10-11. If the Government can show the need for introducing new evidence to properly respond to the issue, it can ask for that opportunity and certainly should receive it.[11] As with any number of forfeited issues that may be raised on appeal – including questions of jurisdictional amount and citizenship – any need to accommodate additional evidence is well within the procedural competence of the courts. Such remedies amply address the Government's concern with having a fair opportunity to demonstrate compliance.

In any event, those same concerns are inevitable in the context of an ineffective-assistance-of-counsel claim. The only difference is the issue will have grown more attenuated, the court hearing the habeas petition will be less familiar with the case, and a defendant may have spent years in prison contrary to congressional command.

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[11] Even if there is some factual component to the limitations claim that should have been presented to the jury, the cleaner answer would be to find that Petitioner only waived his right to a jury determination of the issue, rather than waived the issue entirely. Any required factual issues thus could be remanded to the trial court for determination. Such court, having heard the other evidence at trial, would be in a better position to resolve any further issues than would be a habeas court years later.

B. At a Minimum, Plain-Error Review Is Available for Forfeited Statute-of-Limitations Bars.

The Government argues that because it has no duty to plead compliance with the statute of limitations, there is no error when the defendant fails to raise it. But Rule 52(b) includes "defects" within its category of reviewable plain errors. At a minimum, non-compliance with an affirmative congressional prohibition against time-barred prosecution, trial, and punishment constitutes a "defect" regardless who bears the initial burden of raising it.

Olano rejected a comparable theory claiming no error absent a required objection. 507 U.S. at 733-34. Indeed, the rule *only* applies where an argument was thus forfeited. That plain-error review applies even to rulings correct under controlling precedent when made, but rendered erroneous by intervening law, *United States v. Cotton*, 535 U.S. at 632, demonstrates that the Government's theory of error is mistaken. Here, non-compliance with an express congressional prohibition on time-barred conduct by prosecutors and the court is a plain error. *See United States v. Franco-Santiago*, 681 F.3d 1, 13 (1st Cir. 2012); *United States v. Baldwin*, 414 F.3d 791, 795 & n.2 (7th Cir. 2005), *overruled on other grounds by United States v. Parker*, 508 F.3d 434 (7th Cir. 2007).

That a court should not raise affirmative defenses that were knowingly and intentionally abandoned, U.S. Br. 44, does not answer whether an inadvertent potential forfeiture should be ignored by a court. The lower court in *Day*, for example, raised the limitations bar *sua sponte*, 547 U.S. at 201, and the better

practice might encourage trial courts to inquire into any prospective limitations issues in order to preempt time-consuming problems down the line. Pet. Br. 57.

As for the Government's argument, at 44-45, that violation of the limitations period can never be "plain" given the potential for rebuttal, that view gets the issue backwards. Here, the Superseding Indictments on their faces are outside the 5-year window and, once the issue has been raised, it is the Government's burden to establish compliance with the limitations period. That the Government might eventually meet its burden and save its Superseding Indictment does not make the facial violation any less plain.

C. The Statute of Limitations Is a Jurisdictional Constraint on the Power of the Courts and the Executive Branch.

The Government, at 34-38, reiterates its argument that the limitations bar is an affirmative defense, not a jurisdictional constraint, citing *United States v. Cook*, 84 U.S. (17 Wall.) 168 (1872), *Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917), and *Smith v. United States*, -- U.S. --, 133 S. Ct. 714, 719-20 (2013). Those cases, however, addressed pleading and proof issues, and did not analyze whether § 3282(a) was jurisdictional. They cannot be viewed as resolving that issue *sub silentio* without regard to more recent jurisprudence on jurisdiction.

As noted in Petitioner's opening brief, *Cook* concerned archaic formalities of pleading that no longer have relevance in federal court. Pet. Br. 45-46. The primary concern in *Cook* was whether the Govern-

ment would have an opportunity to respond to a limitations claim with evidence, if necessary, not whether it was jurisdictional. Modern rules can provide such an opportunity, and hence *Cook* is no more than a vestige of a bygone era of complicated formalities.[12] Indeed, the same concern regarding an opportunity to introduce evidence can arise as to other jurisdictional questions – amount in controversy; citizenship – yet do not negate their jurisdictional nature.

The Government also notes, at 37, that the defendant in *Cook* argued that where an indictment does not on its face embody a charge of a crime the court lacks "jurisdiction" and that such defect in the indictment can be raised at any time. 84 U.S. (17 Wall.) at 170-71. That characterization of failure to state a claim as being a jurisdictional problem was not echoed by this Court, and is a good example of this Court's more modern recognition of the previously sloppy use of the term "jurisdiction." *See Bowles v. Russell*, 551 U.S. 205, 210 (2007); *id.* at 215-16 (Souter, J., dissenting) (noting efforts to clean up previously less than meticulous use of the term "jurisdiction"). Neither the holding of *Cook*, nor the loose use of the word "jurisdiction" by an advocate in that case resolves whether § 3282(a) is jurisdictional.

The Government fares no better with its citation to *Smith*, -- U.S. at --, 133 S. Ct. at 719-20. The observation that the limitations period is not an "element"

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[12] That *Cook* characterized the limitations bar as a " 'matter of defence' to be established by the defendant," U.S. Br. 35 (quoting *Cook*), confirms it as an anachronism. The Government concedes a defendant only bears the burden of raising, not establishing, a limitations bar.

of an offense is irrelevant to whether it is a jurisdictional restriction. The discussion in *Smith* involved who bore the burden of arguing *withdrawal* from a conspiracy outside the limitations period. This Court observed that the burden was on the defendant, though noted that the burden of proof, if not the burden of pleading, for ordinary limitations issues was on the Government. *Id.* at 721. That *Smith* cited *Cook* and *Biddinger* for their pleading holdings does not convert them into jurisdictional rulings.

Ultimately, categorizing the limitations bar as an affirmative defense for pleading purposes begs the question whether it is also a non-waivable jurisdictional limit. The concerns driving pleading rules are not identical to the considerations driving the jurisdictional analysis. Congress in § 3282(a) expressly articulated a constraint on the power of the courts and the executive branch. There is nothing inconsistent in not requiring the Government to specifically plead compliance yet addressing the issue of court authority whenever it may be raised.

Regarding this Court's modern cases, the Government, at 38-39, does not even cite *Bowles*, much less distinguish it. Instead it cites cases involving very different civil statutes that are readily distinguished. *See Sebelius v. Auburn Reg'l Med. Ctr.*, -- U.S. --, 133 S. Ct. 817, 824-25 (2013) (time period for administrative appeal regarding health-care reimbursement; permissive language distinguished from mandatory language in *Bowles*); *United States v. Wong*, -- U.S. --, 135 S. Ct. 1625, 1632 (2015) (allowing equitable tolling of time limits for civil claims under the FTCA where statute's text, unlike here, "speaks only to a

claim's timeliness, not to a court's power"); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010) (requirement that copyright holders register their works before they can sue for copyright infringement not a limitation on federal court jurisdiction, merely a precondition to plaintiff's right to sue). The far better example is *Bowles* itself, which involved a statute less clearly addressing the power of the courts than does the limitations bar in § 3282(a). Pet. Br. 41-43.

Regarding the language of the § 3282(a), the Government notes that the Grand Jury Clause prohibits holding a person "to answer" for serious crime absent presentment or indictment of a grand jury, yet is deemed waivable. But such matters are waivable because they present defects in the indictment that specifically "must" be raised by pretrial motion under FED. R. CRIM. P. 12(b)(3), failure to do so without good cause being deemed a waiver. Congress is entitled to make that choice regardless of the wording of the constitutional provision. But it has *not* made such a choice regarding statute-of-limitations bars, which are *not* included in the required motions under Rule 12(b)(3). Pet. Br. 50-52.

The Government's discussion of *Spaziano v. Florida*, 468 U.S. 447, 454-57 (1984), regarding the right to instructions on a lesser-included offense in a capital case if defendant waives any limitations bar reads too much into that case. The *state* limitations statute in that case had no bearing on this Court's jurisdiction, was not claimed to have ousted the state court's jurisdiction, and hence has nothing to do with the issues in this case. Furthermore, that this was a death penalty case tends to undermine any broader conclu-

sions that might be drawn from it. 468 U.S. at 456. The understandable reluctance to allow the State to leverage a death penalty verdict by making the case all or nothing would overshadow any lurking jurisdictional issues not raised by the parties. The case surely cannot be read as a holding on the jurisdictional issue, merely a result that might have been different had the case involved federal crimes tried in federal court.[13]

* * * *

In the end, this Court need only decide the question presented whether review on direct appeal is available for inadvertently forfeited limitations bars. Because courts will have to address such forfeited issues eventually, it would be best to do so sooner rather than later. Whether this Court chooses a narrow or a broad rationale, it should answer the question presented in favor of review on appeal.

CONCLUSION

For the reasons above, this Court should reverse the decision of the court of appeals and remand for further proceedings.

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[13] The Government's pre-1944 circuit cases rejecting plain error review of forfeited limitations bars, U.S. Br. at 48 & n. 22, are as irrelevant to this Court's task as are the cases on the Government's side of the split. The whole point here is that the circuits disagree. Merely citing older cases from the same circuits that disagree now (or worse still, rejected law from the Seventh Circuit, which now allows such review) does not indicate what the answer should be, it merely reiterates the conflict.

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